178

Supreme Court, U.S.
FILED

No. 10-873 DEC 30 2010

OFFICE OF THE CLERK

In The Supreme Court of the United States

IDELMA ANA SAENZ, YOLANDA RAMIREZ, GLORIA SAENZ, Individually and as Next Friend of Diana Figueroa, DIANA FIGUEROA, JESUS HENRY SAENZ and JESUS SAENZ, Individually and as Administrator of the Estates of Dominga Saenz and Nelson Saenz,

Petitioners,

v.

CITY OF MCALLEN, ARMANDO HERNANDEZ, HUMBERTO RESENDEZ, ORLANDO OLIVAREZ and YASSER HASSAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TRACY J. WILLI
Counsel of Record
JAMES N. WILLI
WILLI LAW FIRM, P.C.
9600 Escarpment Blvd.
Ste. 745, PMB 34
Austin, TX 78749-1983
Tel. (512) 288-3200
Fax (512) 288-3202
twilli@willilawfirm.com

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Has the United States Court of Appeals for the Fifth Circuit engaged in improper and illogical legal analysis requiring that the Circuit issue an opinion recognizing the "state-created danger theory as a basis for liability" before a police officer will have notice that his actions in violation of a constitutional right could result in waiver of governmental immunity?

Did the City of McAllen police officers violate the elderly Dominga Saenz' substantive rights under the Due Process Clause by placing her at increased risk and failing to protect her when they: (1) summoned Dominga to the scene after the police had tried but failed to extricate and arrest her adult son, Nelson Saenz, for a mental health commitment, whom the police officers knew had a gun, was agitated, had made a death threat to a family member that day, was not taking his medicine for his mental illness, and had killed his wife previously with an axe; (2) physically took Dominga out of a car and placed her at the front door because she could not walk on her own and instructed her to beg her son to come out while the police officers laid in wait behind her with their guns ready; (3) the police officers confirmed with each other before Dominga arrived that they were all wearing their bullet proof vests because Nelson was the "real deal"—meaning he had killed before during a similar psychotic episode, but made no attempt to protect Dominga in any way during the police action;

QUESTION PRESENTED – Continued

and (4) opened fire on Nelson with Dominga caught in the cross-fire and the police shot Dominga multiple times?

Were the City of McAllen police officers faced with a clearly established duty to protect Dominga Saenz when they summoned her under color of state law, Tex. Code Crim. P. art. 2.14, to physically participate and assist the police officers in extricating and arresting her schizophrenic son who had barricaded himself inside his apartment with a gun?

Can the City of McAllen be held liable under the specific circumstances of this case, including its failure to train the police officers in dealing with the mentally ill?

PARTIES

Petitioners: Idelma Ana Saenz, Yolanda Ramirez, Gloria Saenz, Individually and as Next Friend of Diana Figueroa, Diana Figueroa, Jesus Henry Saenz and Jesus Saenz, Individually and as Administrator of the Estates of Dominga Saenz and Nelson Saenz

Respondents: City of McAllen, Armando Hernandez, Humberto Resendez, Orlando Olivarez and Yasser Hassan

CORPORATE DISCLOSURE STATEMENT

The City of McAllen is a municipality in the state of Texas. Respondents, Armando Hernandez, Humberto Resendez, Orlando Olivarez and Yasser Hassan, are police officers employed by the City of McAllen. The Petitioners are the family and estates of the deceased, Nelson Saenz and Dominga Saenz.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	iii
CORPORATE DISCLOSURE STATEMENT	iv
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	6
ARGUMENT	10
I. The United States Court of Appeals for the Fifth Circuit has engaged in improper and illogical legal analysis requiring that the Circuit issue an opinion recognizing the "state-created danger theory as a basis for liability" before a police officer will have notice that his actions in violation of a constitutional right could result in waiver of governmental immunity	10
A. The Fifth Circuit's incorrect analysis is firmly entrenched and will continue to affect future cases unless this Court intervenes	12
B. The Fifth Circuit is the only Circuit that does not recognize the "state-created danger" theory as a concept to avoid governmental immunity	14

TABLE OF CONTENTS – Continued

Page

C. The Fifth Circuit's argument is circular and relies upon a false premise that the "state-created danger" theory is a constitutional right. Instead, the legal theory is a guide to analyze whether a constitutional right was violated 15

D. Using the correct analysis, Dominga Saenz' substantive due process rights were clearly established 19

II. The Fifth Circuit fails to address the thrust of the Petitioners' claim for municipal liability—the City's failure to train and adopt appropriate policies 25

III. Conclusion and Prayer 32

APPENDIX

October 4, 2010, Opinion of the United States Court of Appeals for the Fifth Circuit .....App. 1-15

September 28, 2007, Memorandum of Decision and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss .....App. 16-46

September 28, 2007, Order Granting in Part and Denying in Part Defendants' Motion to Dismiss .....App. 47-48

September 21, 2009, Memorandum of Decision and Order Granting Defendants' Motion for Summary Judgment .....App. 49-71

September 21, 2009, Judgment Dismissing Claims.....App. 72

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266 (1994) 22

Anderson v. Creighton, 483 U.S. 635 (1987) 20

Anthony v. City of Chicago, 523 N.E.2d 22 (Ill. App. Ct. 1988) 23, 24

Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397 (1997) 27

Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982) 14

Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961) 19

Bustos v. Martini Club Inc., 599 F.3d 458 (5th Cir. 2010) 13

City of Canton v. Harris, 489 U.S. 378 (1989) 26, 30

Collins v. City of Harker Heights, 503 U.S. 115 (1992) 16

Conley v. Gibson, 355 U.S. 41 (1957) 11

Cnty. of Sacramento v. Lewis, 523 U.S. 833 (1998) 16, 22

Davis v. Brady, 143 F.3d 1021 (6th Cir. 1998) 13

DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189 (1989) 11

Farmer v. Brennan, 511 U.S. 825 (1994) 22

Gibson v. Cnty. of Washoe, 290 F.3d 1175 (9th Cir. 2002) 31

Hemphill v. Schott, 141 F.3d 412 (2d Cir. 1998) 21, 23

Hope v. Pelzer, 536 U.S. 730 (2002) 20

TABLE OF AUTHORITIES – Continued

Page

Ingraham v. Wright, 430 U.S. 651 (1977) 19

Koulta v. Merciez, 477 F.3d 442 (6th Cir. 2007) 23

Kovacic v. Villarreal, No. 10-40208 (5th Cir. Dec. 16, 2010) 13

Long v. Cnty. of Los Angeles, 442 F.3d 1178 (9th Cir. 2006) 31

Lennon v. Miller, 66 F.3d 416 (2d Cir. 1995) 20

Malley v. Briggs, 475 U.S. 335 (1986) 20

McClendon v. City of Columbia, 305 F.3d 314 (5th Cir. 2002) 12

McDonald v. Haskins, 966 F.2d 292 (7th Cir. 1992) 21

Martinez v. California, 444 U.S. 277 (1980) 25

Medina v. California, 505 U.S. 437 (1992) 22

Morin v. Moore, 309 F.3d 316 (5th Cir. 2002) 13

Munger v. City of Glasgow Police Dep't, 227 F.3d 1082 (9th Cir. 2000) 23

Oliver v. Fiorino, 86 F.3d 898 (11th Cir. 2009) 21

Palko v. Connecticut, 302 U.S. 319 (1937) 16

Patterson v. New York, 432 U.S. 197 (1977) 22

Pearson v. Callahan, ___ U.S. ___, 129 S.Ct. 808 (2009) 15, 16

Radecki v. Barela, 146 F.3d 1227 (10th Cir. 1998) 24

TABLE OF AUTHORITIES – Continued

Page

Rios v. City of Del Rio, 444 F.3d 417 (5th Cir. 2006) 13

Saucier v. Katz, 533 U.S. 194 (2001) 15, 16 17

Skinner v. City of Miami, 62 F.3d 344 (11th Cir. 1995) 16

Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002) 21

Walker v. Livingson, No. 09-20508, 2010 WL 2465035 (5th Cir. June 17, 2010) 12

CONSTITUTION

U.S. CONST. amend. XIV, § 1 ..... 2, 17, 19

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 2, 26

TEX. CODE CRIM. P. art. 2.13 3

TEX. CODE CRIM. P. art. 2.14 ..... 3, 7, 11, 19, 29

TEX. CODE CRIM. P. art. 2.15 ..... 4, 7, 19, 29

TEX. HEALTH & SAFETY CODE § 573.001 ..... 4, 6, 7

TEX. HEALTH & SAFETY CODE § 573.002 24

TABLE OF AUTHORITIES – Continued

Page

REFERENCES

T. EDWARD DAMER, ATTACKING FAULTY REASONING: A PRACTICAL GUIDE TO FALLACY-FREE ARGUMENTS (Wadsworth 2009) 17

Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165 (2005) 14

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued its opinion on October 4, 2010, which is attached as Appendix 1-15. *Saenz v. City of McAllen*, No. 09-41072, 2010 WL 3852358 (5th Cir. Oct. 4, 2010) (unpublished). The District Court issued a Memorandum of Decision and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss on September 28, 2007, which are attached as Appendix 16-48. *Saenz v. City of McAllen*, No. 06-00352 (S.D. Tex. Sept. 28, 2009). The District Court issued a Memorandum of Decision and Order Granting Defendants' Motion for Summary Judgment and rendered judgment on that order on September 21, 2009, which are attached as Appendix 49-72. *Saenz v. City of McAllen*, No. 06-00352 (S.D. Tex. Sept. 21, 2009). The District Court opinions are not available on any electronic service other than Public Access to Court Electronic Records (PACER).

JURISDICTION

The judgment of the United States Fifth Circuit Court of Appeals was entered on October 4, 2010. (App. 1-15.) There were no motions for rehearing filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such office's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

TEX. CODE CRIM. P. art. 2.13 Duties and Powers

(a) It is the duty of every peace officer to preserve the peace within the officer's jurisdiction. To effect this purpose, the officer shall use all lawful means.

(b) The officer shall:

(1) in every case authorized by the provisions of this Code, interfere without warrant to prevent or suppress crime;

(2) execute all lawful process issued to the officer by any magistrate or court;

(3) give notice to some magistrate of all offenses committed within the officer's jurisdiction, where the officer has good reason to believe there has been a violation of the penal law; and

(4) arrest offenders without warrant in every case where the officer is authorized by law, in order that they may be taken before the proper magistrate or court and be tried.

(c) It is the duty of every officer to take possession of a child under Article 63.009(g).

TEX. CODE CRIM. P. art. 2.14 May Summon Aid

Whenever a peace officer meets with resistance in discharging any duty imposed upon him by law, he shall summon a sufficient number of citizens of his county to overcome the resistance; and all persons summoned are bound to obey.

TEX. CODE CRIM. P. art. 2.15 Person Refusing to Aid

The peace officer who has summoned any person to assist him in performing any duty shall report such person, if he refuse to obey, to the proper district or county attorney, in order that he may be prosecuted for the offense.

TEX. HEALTH & SAFETY CODE § 573.001 Apprehension by Peace Officer Without Warrant

(a) A peace officer, without a warrant, may take a person into custody if the officer:

(1) has reason to believe and does believe that:

(A) the person is mentally ill; and

(B) because of that mental illness there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained; and

(2) believes that there is not sufficient time to obtain a warrant before taking the person into custody.

(b) A substantial risk of serious harm to the person or others under Subsection (a)(1)(B) may be demonstrated by:

(1) the person's behavior; or

(2) evidence of severe emotional distress and deterioration in the person's mental

condition to the extent that the person cannot remain at liberty.

(c) The peace officer may form the belief that the person meets the criteria for apprehension:

(1) from a representation of a credible person; or

(2) on the basis of the conduct of the apprehended person or the circumstances under which the apprehended person is found.

(d) A peace officer who takes a person into custody under Subsection (a) shall immediately transport the apprehended person to:

(1) the nearest appropriate inpatient mental health facility; or

(2) a mental health facility deemed suitable by the local mental health authority, if an appropriate inpatient mental health facility is not available.

(e) A jail or similar detention facility may not be deemed suitable except in an extreme emergency.

(f) A person detained in a jail or a nonmedical facility shall be kept separate from any person who is charged with or convicted of a crime.

STATEMENT OF THE CASE

While there are disputed facts in this case, the facts as accepted by the United States Court of Appeals for the Fifth Circuit provide more than sufficient support to reverse this case for a trial on the merits. For the purpose of this Petition for Writ of Certiorari, the Petitioners recite the facts as stated by the Fifth Circuit (App. 2-4) and complete the picture with a few other salient points.

Nelson Saenz, Dominga's son, had a history of serious mental illness and had murdered his wife years ago. In the days leading up to the events in question, Nelson's mental health had deteriorated. He had allegedly stopped taking his medication, acquired a gun, and threatened to kidnap certain members of his family. On September 3, 2005, Investigator Armando Hernandez, a 15-year veteran of the City of McAllen's police department, and his wife, Linda Hernandez, went to Nelson's apartment for the purpose of having him committed.[1] Linda was Dominga's niece. Armando and Linda knew of Nelson's mental illness, history of violence, and deteriorating mental condition. Armando attempted to get Nelson to come outside but Nelson refused and barricaded himself in his apartment, telling Armando to "come back next week." Armando called for backup

[1] The parties use the terms "committing" or "sectioned" interchangeably to describe the procedure to commit Nelson Saenz to a mental health facility pursuant to section 573 of the Texas Health and Safety Code.

and McAllen police officers Olivarez Hassan, Humberto Resendez, and Yassar Hassan eventually arrived. Armando then developed a "plan of approach" to extract Nelson from his apartment. Dominga would knock on Nelson's front door in an attempt to coax her son to come out of his apartment while the police officers would remain in front of the house but out of Nelson's line of sight. (App. 2.)

Armando summoned Dominga to Nelson's apartment.[2] She arrived with her daughters Yolanda Ramirez and Idelma Saenz. Armando removed Dominga from the vehicle and pulled her to Nelson's front door, staying behind her while the other officers got in the "ready position." Yolanda, realizing that Dominga was being taken to Nelson's door in order to extract him, yelled for the police to move Dominga away from the entrance because Nelson had a gun. Nelson began yelling profanities at the police officers. Dominga attempted to get Nelson to come out of his apartment, but after no response she knelt down to pray. When Dominga started to stand, Nelson opened his door and started shooting. The police officers returned fire. Both Nelson and Dominga were killed in the exchange. Dominga was shot eleven times.

---

[2] By the term "summoned," the Fifth Circuit is referring to Texas Code of Criminal Procedure article 2.14, which provides that a peace officer may "summon" the aid of a civilian when he meets with resistance in the discharge of his duty, such as when making a warrantless arrest under Texas Health and Safety Code section 573.001. A citizen is subject to criminal penalty for a failure to obey this summon. TEX. CODE CRIM. P. art. 2.15.

Nelson's gun held only nine rounds. Petitioners submitted expert testimony evidencing that Dominga was shot at least four times by the officers' weapons. (App. 3-4.)

A few additional facts not included in the Fifth Circuit's opinion are important to a full analysis of this case. Before the other officers arrived at the scene, the City of McAllen dispatch had already informed the officers that Investigator Hernandez was at the scene and they were to report to him for details. (USCA5 373-77.) Upon arrival, the younger officers immediately reported to Investigator Hernandez, who was, by far, the highest ranking and most veteran of the police officers at the scene. (USCA5 795, 965, 972-73.)

Investigator Hernandez told the other police officers that he was in fear of Nelson causing harm to himself or others. (USCA5 377-79.) Investigator Hernandez told the other police officers that he was worried about Nelson's welfare and that Nelson was the "real deal," meaning that he killed someone before in the same situation and he could do so again in this situation. (USCA5 378-80.) He also advised the other police officers that Nelson had threatened to kill his sister earlier that day. He also advised the other police officers that Nelson had a gun. Investigator Hernandez made sure that the other officers were wearing their bullet-proof vests so that they would be less likely to be injured if a gun fight occurred. (USCA5 381.) Before Dominga approached the door, Officer Hassan made a call to the City of McAllen

dispatch to "clear channel 1," which keeps a channel open in case an emergency call must be made. (USCA5 856.) Officer Hassan also recognized that the disturbance was escalating when he requested the City of McAllen dispatch for additional back up police officers. (USCA5 856.)

Before the car even stopped rolling, Investigator Hernandez had opened the car door and began pulling Dominga out of the car. (USCA5 480, 488, 601, 611, 615.) Investigator Hernandez forcibly removed Dominga from the car. (USCA5 630.) Dominga, who was 75 years old, needed assistance to walk and Investigator Hernandez and his wife were on either side of Dominga, holding her arms, escorting her towards Nelson's door. Investigator Hernandez was saying, "Hurry!" (USCA5 615, 630-31, 633, 480, 488, 491, 609-12, 615, 631, 904-05.)

This incident occurred on September 3, 2005. Investigator Hernandez was hired by the City of McAllen Police Department in 1990. (USCA5 235.) Nothing in his training allowed or disallowed an officer to bring in a third party, such as a family member, into any situation. (USCA5 233-34.) The City of McAllen police officers had no training in crisis intervention for the mentally ill prior to the incident in question. (USCA5 812-13, 974-76.) The training records of the four officers involved is devoid of any training on crisis intervention and/or response to the mentally ill prior to this incident. (USCA5 974.) According to Petitioner's expert, each of these training issues are implicated by the facts of this case.

(USCA5 849-58.) If the City of McAllen had provided its police officers with even some of this training, this tragedy would have been prevented.

ARGUMENT

I. The United States Court of Appeals for the Fifth Circuit has engaged in improper and illogical legal analysis requiring that the Circuit issue an opinion recognizing the "state-created danger theory as a basis for liability" before a police officer will have notice that his actions in violation of a constitutional right could result in waiver of governmental immunity.

The Fifth Circuit plainly states its conclusion in this case that, "Because the state-created danger theory as a basis for liability was not clearly established at the time the incident occurred, the individual defendants are entitled to qualified immunity." (App. 11-12.) The Petitioners request this Court to correct the Fifth Circuit's circular analysis so that the test for whether a constitutional duty or right is "clearly established" is not whether a reasonable police officer would know that the Fifth Circuit has recognized the "state-created danger theory" as a basis for liability. Instead, the appropriate test is whether a reasonable police officer would recognize that there was a clearly established constitutional duty to protect a citizen under the particular factual circumstances of each case.

In this case, a reasonable police officer would know that he had a duty to protect Dominga Saenz, and not place her in mortal danger and enhance the risk to her, when he summoned the elderly Dominga Saenz pursuant to TEX. CODE CRIM. P. art. 2.14 to physically participate and assist the police officers in extricating and arresting her schizophrenic son who had barricaded himself inside his apartment with a gun. The Fifth Circuit failed to conduct a proper legal analysis in this case to determine whether the legal theories of state-created danger or special relationship justify waiver of governmental immunity. *See DeShaney v. Winnebago Cnty. Dep't Soc. Servs.*, 489 U.S. 189, 199-201 (1989). The pleadings in this case[3] support either, or a combination of, the "state-created danger" and "special relationship" circumstances described in *DeShaney*. *See id.*

---

[3] The Fifth Circuit incorrectly limited its review to the "state-created danger" circumstance described in *DeShaney*, rather than include analysis of a "special relationship" circumstance also described in *DeShaney*. (App. 12, n.6.) The Fifth Circuit incorrectly concluded that since the case was brought "pursuant to *DeShaney*," it was precluded from considering the "special relationship" aspect of this case. *Id.* The pleadings and the summary judgment evidence set forth the circumstances forming the basis of the claim to avoid governmental immunity. The pleadings provided fair notice of how the parties sought to avoid governmental immunity. (USCA5 139-46); *see Conley v. Gibson*, 355 U.S. 41, 48 (1957).

A. The Fifth Circuit's incorrect analysis is firmly entrenched and will continue to affect future cases unless this Court intervenes.

Under the Fifth Circuit's current analysis, police officers have *carte blanche* authority to physically place a person at an increased risk of danger and deliberately ignore that person's right to safety without waiving governmental immunity because the Fifth Circuit has explicitly stated that any such action is not clearly established as a basis for waiving governmental immunity until the Fifth Circuit specifically recognizes the "state-created danger theory" as a basis for liability. (App. 10.) The Circuit makes its analysis clear by listing several cases in which it insists that because the "state-created danger theory" was not recognized in the Fifth Circuit, the claim will not be recognized—regardless of whether the facts supported the theory:

> Further, we have found that the state created danger theory was not clearly established for conduct that occurred in 1993. *See McClendon*, 305 F.3d at 332-33 [*McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002)]. More recently this court has held that the state created danger theory is "not clearly established law within this circuit such that a § 1983 claim based on this theory could be sustained" for an incident that occurred in 2006. *See Walker v. Livingson*, No. 09-20508, 2010 WL 2465035, *2 (5th Cir. June 17,

> 2010) (unpublished) (citing *Morin v. Moore*, 309 F.3d 316, 321 (5th Cir. 2002)).

(App. 10.)

The Fifth Circuit's analysis in this case is not an accidental or isolated misstatement of the law—it is the pervasive analysis in multiple Fifth Circuit decisions, which continues to affect new cases. As recently as December 16, 2010, the Fifth Circuit reiterated its insistence that it had not adopted the state-created danger theory and that any actions taken by police officers before that arbitrary point in time will be protected by governmental immunity, without regard to the specific facts supporting a constitutional violation:

> The Fifth Circuit has not adopted the 'state-created danger' theory of liability. *See Bustos v. Martini Club Inc.*, 599 F.3d 458, 466 (5th Cir. 2010); *Rios v. City of Del Rio*, 444 F.3d 417, 422 (5th Cir. 2006). As such, the analysis in *Davis* [*Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998)] pertaining to whether the police officers put the victim in a more vulnerable position than he would have been otherwise is not applicable in this circuit and would not put the officers on reasonable notice of a constitutional violation.

Kovacic v. Villarreal, No. 10-40208 (5th Cir. Dec. 16, 2010).

The Fifth Circuit's incorrect analysis is firmly entrenched. It will not change without intervention by this Court.

B. The Fifth Circuit is the only Circuit that does not recognize the "state-created danger" theory as a concept to avoid governmental immunity.

Every Circuit, except the Fifth Circuit, has recognized the concept of state-created danger. *See* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1173 (2005); *see also* App. 7, n.4. Judge Posner introduced the snake pit analogy to describe the obvious constitutional implications when the state crosses the line from inaction to action: "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

Without guidance from this Court, the Petitioners, and certainly others in the future, will not obtain a fair and unbiased review of their constitutional violations because the Fifth Circuit refuses to even evaluate the facts of a "state-created danger theory" case until some arbitrary time after which the Fifth Circuit decides whether it will recognize that theory. As a result, true constitutional violations will continue

to be ignored as a result of forces beyond the victims' control. The analysis engaged in by the Fifth Circuit is, itself, a violation of the victim's procedural due process rights because the Fifth Circuit's refusal to conduct a proper judicial review of constitutional violations is arbitrary and unreasonable. Whether the constitutional right is clearly established must be analyzed not as a broad proposition but with consideration to the case's specific context. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

C. The Fifth Circuit's argument is circular and relies upon a false premise that the "state-created danger" theory is a constitutional right. Instead, the legal theory is a guide to analyze whether a constitutional right was violated.

When a defendant raises the qualified immunity defense, the plaintiff must demonstrate that: (1) the facts alleged show that the officer's conduct violated a constitutional right; and (2) the right was clearly established at the time of the conduct. *See Pearson v. Callahan*, ___ U.S. ___, 129 S.Ct. 808, 815-18 (2009). The first question in determining whether the police officers should receive the protection of qualified immunity is whether they violated Dominga Saenz' constitutional rights—in this case, whether their actions constituted a violation of the substantive component of the Due Process Clause *via* the state-created danger exception. *See Saucier*, 533 U.S. at 201. To establish a violation of substantive due

process rights, a plaintiff must demonstrate that the state action was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998). The substantive component of the Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Substantive due process applies to "those rights that are 'fundamental'—rights that are 'implicit in the concept of ordered liberty,'" such as the right to be free from state-sponsored torture. *Skinner v. City of Miami*, 62 F.3d 344, 347 (11th Cir. 1995) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937) (noting that the Due Process Clause must at least "give protection against torture, physical or mental")).

In *Saucier*, this Court mandated that courts determine the issue of whether there was a violation of a constitutional right first, then determine the issue of whether the unconstitutionality of the conduct was clearly established. *Saucier*, 533 U.S. at 201. In *Pearson*, this Court retreated from the mandate in *Saucier*, and left it to the lower courts to decide which prong to address first. *Id.* at 818. However, as this Court stated in *Pearson*, the two-step order provided in *Saucier* is often appropriate and beneficial. *Id.* at 818. This is a case wherein the *Saucier* two-step analysis should be considered in its proper sequence. The lack of sequenced analysis may work in Fourth Amendment cases like *Pearson*, but can

cause confusion when applied to a Fourteenth Amendment claim like this one. The Fifth Circuit in this case claims to be analyzing whether the constitutional right was clearly established at the time of the conduct. (App. 8-12.) But its discussion demonstrates that its failure to consider the first prong, whether there was a violation of a constitutional right, has resulted in reliance on a false premise—that the "state-created danger" theory is, itself, a constitutional right which must be clearly established.

By skipping past the first *Saucier* prong requiring discussion of the constitutional right and jumping straight to whether the right was clearly established, the Fifth Circuit's analysis has become circular. Arguing in a circle violates the structural criterion of a good argument. T. EDWARD DAMER, ATTACKING FAULTY REASONING: A PRACTICAL GUIDE TO FALLACY-FREE ARGUMENTS 63 (Wadsworth 2009). The circular argument uses its own conclusion as one of its stated or unstated premises. Instead of offering proof, it simply asserts the conclusion in another form, as its conclusion. *Id.* Such arguments are said to beg the question. *Id.*

The Fifth Circuit's argument rests on the false premise that the "state-created danger" theory is, itself, a constitutional right. The state-created danger theory is not a constitutional right—it is a short-hand reference to a theory applicable to a broad category of state actions that could rise to the level of a constitutional violation if a person is injured or killed by a

danger created by the state. The fallacy of the Fifth Circuit's logic is illustrated by its structure:

(1) The "state-created danger" theory is a constitutional right.

(2) The Fifth Circuit has not recognized the "state-created danger" theory.

Therefore:

(3) The constitutional right known as the "state-created danger" theory is not "clearly established" in the Fifth Circuit.

The first premise is false and that false premise is incorporated into the Fifth Circuit's conclusion. The conclusion begs the question of whether the "state-created danger" theory is a constitutional right. Thus, the Fifth Circuit's conclusion is invalid because it rests upon a false premise.

If the Fifth Circuit had applied the *Saucier* two-step order of analysis, it would have evaluated the facts of this case to determine whether Dominga Saenz had a constitutional right to substantive due process in this particular circumstance. Then, it would have applied the second prong of *Saucier* and determined whether that constitutional right was "clearly established." The state-created danger theory provides a helpful background to determine whether a constitutional right has been violated, but it is not the basis of liability nor is it the matter which must be "clearly established" in the context of governmental immunity.

D. Using the correct analysis, Dominga Saenz' substantive due process rights were clearly established.

If the Fifth Circuit had analyzed the first prong of *Saucier* correctly, it could have relied on its own precedent that there is a constitutional right not to be injured or murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. *Brazier v. Cherry*, 293 F.2d 401, 404-05 (5th Cir. 1961). Dominga Saenz was shot by police officers after the police officers affirmatively ordered her to participate in an obviously dangerous police action and failed to take any precautionary measures to protect her. The City of McAllen and its police officers deprived Dominga Saenz of her liberty interest in "free[dom] from . . . unjustified intrusions on personal security," *see Ingraham v. Wright*, 430 U.S. 651, 673 (1977), by failing to provide her with adequate protection against her son's violence when they officially summoned her aid in a police action, pursuant to state law, with criminal consequences if she refused, to extricate her mentally ill, armed son from his apartment so that the police could arrest him. *See* TEX. CRIM. CODE P. art. 2.14, 2.15.

While the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right, this is not to say that an official action is protected by qualified immunity unless the very action in question has

previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[T]he salient question . . . is whether the state of the law [at the time of the incidents in question] gave respondents fair warning that their alleged treatment of [the victim] was unconstitutional."). The objective reasonableness test is met, and police officers will enjoy qualified immunity, if the question whether the officers would be violating rights is one on which "officers of reasonable competence could disagree." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). If, on the other hand, no officer of reasonable competence would conclude that the conduct in question is lawful, there is no immunity. *See Lennon v. Miller*, 66 F.3d 416, 420-21 (2d Cir. 1995).

The Fifth Circuit should examine the particular facts of each case to determine whether an individual had fair warning that his or her behavior would violate the victim's constitutional rights. *See Hope*, 536 U.S. at 741-45 (finding that in light of binding circuit precedent, applicable state regulations, a Department of Justice report informing the state's department of corrections of the "constitutional infirmity" of handcuffing an inmate to a hitching post, and the "obvious cruelty inherent" in the practice, respondents had "fair and clear warning" that use of the hitching post in that case violated the victim's constitutional rights). "It would create perverse incentives indeed if a qualified immunity defense

could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books." *McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992); *see also Hemphill v. Schott*, 141 F.3d 412, 418 (2d Cir. 1998) ("One embodiment of this . . . claim for relief from excessive force based in due process is the situation in which a state actor aids and abets a private party in subjecting a citizen to unwarranted physical harm."). Where the case is one of "obvious clarity," where the officer's conduct "lies so obviously at the very core" of what the Constitution prohibits that the unlawfulness of the conduct was readily apparent to the state actor, notwithstanding the lack of fact-specific case law on point, a right should be found to be "clearly established," even in the absence of case law. *See Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009) (quoting *Vinyard v. Wilson*, 311 F.3d 1340, 1355 (11th Cir. 2002)).

It requires no inferential leap, in light of what the officers knew, for a reasonable fact finder to conclude that the officers' actions demonstrate a willful disregard for obvious risks of placing an untrained citizen into a physical police action involving a mentally ill, armed, barricaded subject and providing absolutely no protection to that citizen, and in fact, increasing the risk to the citizen by taking the citizen from a car where there would be some protection and placing that citizen, who is elderly and cannot walk well, much less run, at the very place where the most danger is known to exist. Government

action that does not contravene one of the more specific guarantees of the Bill of Rights may nonetheless violate the Due Process Clause if it "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Albright v. Oliver*, 510 U.S. 266, 282 (1994) (citing *Medina v. California*, 505 U.S. 437, 445 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)). Less culpable conduct has been held to waive governmental immunity for violation of other constitutional rights. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (explaining, in the Eighth Amendment context, that a government official acts with "deliberate indifference" when he or she "knows of and disregards an excessive risk"). The City of McAllen police officers' conduct cannot be explained away by "the pull of competing obligations," as there is no indication that "equally important governmental responsibilities" could justify involving an untrained private citizen in this police action, particularly a family member, when the subject had previously killed a family member during a similar psychotic episode. *See Lewis*, 523 U.S. at 852-853. A reasonable fact finder could find that the officers' affirmative creation or enhancement of the danger to Dominga Saenz was the product of deliberate indifference.

This is a rare case, indeed, but not without precedent to compare. Similar situations have given rise to liability of state actors. The City of McAllen police officers' conduct in this case is easily viewed as ratcheting up the threat of danger to Dominga Saenz.

See Hemphill, 141 F.3d at 418 (finding that a due process violation may occur if the defendants "actually contributed to the vulnerability of the plaintiff"); *see also Koulta v. Merciez*, 477 F.3d 442, 446 (6th Cir. 2007) (explaining that the increased risk of violence turns on "whether [the victim] was safer before the state action than he was after it"); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000) (stating that officers' affirmative conduct endangers a victim if it "left the person in a situation that was more dangerous than the one in which they found him").

While there are not many cases in which the police officers summon the aid of citizens to physically engage in police action, the cases involving that scenario implicate constitutional protections. In *Hemphill*, the officers handed a gun to a store manager who had just been robbed and invited the manager to accompany them in pursuit of the suspect, who was then shot by the store manager during the pursuit. *Hemphill*, 141 F.3d at 418. The officers never told the store manager to shoot the suspect, but in handing over the gun, they implicitly communicated that the manager's subsequent use of the gun would be officially sanctioned. *Id.* at 419. This was the actionable substantive due process violation in *Hemphill*. *See Hemphill*, 141 F.3d at 419. In another case, an untrained civilian was instructed by firefighters to enter a burning building and open an elevator door. *Anthony v. City of Chicago*, 523 N.E.2d 22, 25 (Ill. App. Ct. 1988). The court in *Anthony*

determined that this is not the type of situation where a plaintiff merely seeks protection from the public employee which was not provided. Instead, it was a situation where the plaintiff stated sufficient facts to show that he was under the direct and immediate control of the state actor. *Id.*

It is important to note that the police officers' actions involving Dominga Saenz were not made during an emergency situation. The police officers in this case had the time to deliberate, attempt other avenues, discuss a plan of action, and assemble participants in that plan, including Dominga Saenz, before taking the action that caused this shooting. This is the type of situation where the police officers had the luxury to truly deliberate about the decisions they were making. In this type of situation, something less than unjustifiable intent to harm, such as calculated indifference, is sufficient to shock the conscience. *See Radecki v. Barela*, 146 F.3d 1227, 1231 (10th Cir. 1998). There are several choices that the police officers could have made, including obtaining a warrant for the arrest of Nelson Saenz. *See* TEX. HEALTH & SAFETY CODE § 573.002. While it was the police officers' choice to pursue a warrantless arrest of Nelson Saenz to commit him to a mental health facility, and the facts supported their pursuit of a warrantless arrest in this case, it was inappropriate and shocks the conscience that the police officers would enlist the aid of Dominga Saenz to physically take part in that police action in the way that they did.

This Court has cautioned in evaluating a substantive due process claim that a governmental decision cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander. *Martinez v. California*, 444 U.S. 277, 281 (1980). In this case, however, the harm ultimately caused was foreseeable and was a direct result of the state action.

There can be no dispute that the Constitution protects citizens against a state actor's deliberate indifference to the safety of an elderly, untrained citizen enlisted to participate in the physical police action of making a warrantless arrest of a mentally impaired person, who was known to have a gun, known to have made a death threat earlier that day, and who had killed another immediate family member in a similar mentally impaired state. Petitioners request this Court to correct the flawed analysis entrenched in the Fifth Circuit and reverse and remand this case for further proceedings.

II. The Fifth Circuit fails to address the thrust of the Plaintiffs' claim for municipal liability—the City's failure to train and adopt appropriate policies.

The pleadings in this case specifically raised issues regarding the City of McAllen's failure to control a deadly situation without the involvement of civilians, the failure to train officers on how to handle

a deadly situation involving a mentally ill individual, and the ratification of its police officers' conduct. (USCA5 143.) The summary judgment evidence and the arguments on appeal addressed the City's failure to train and adopt appropriate policies, yet the Fifth Circuit makes no attempt to address the issue of failure to train in its opinion. Instead, the Fifth Circuit sets up only a "straw man" argument of ratification to be deftly knocked down without any factual analysis. (App. 12-14.) The Fifth Circuit incorrectly asserts that the failure to train and adopt appropriate policies was not preserved at the trial court level. (App. 14, n.7.) The lack of training was included in the pleadings. (USCA5 143.) The issue of training was recognized as a cognizable claim by the district court's initial denial of the motion to dismiss. (App. 29-34.) The issue was a firm basis of the evidence in response to the motion for summary judgment and constituted four pages of the expert report of Petitioners' expert, Dr. Blaricom (USCA5 973-77), whose entire deposition testimony, including testimony blasting the City of McAllen for the failure to train, was attached to the Defendants' motion for summary judgment (USCA5 819-23).

"Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable for such a failure under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). Deliberate indifference by the municipality may be established where "a violation of federal rights may be a highly predictable consequence of a failure to equip

law enforcement officers with specific tools to handle recurring situations." *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 409 (1997). Under this standard, the Petitioners have established a genuine issue of fact for the jury on the question of the City of McAllen's failure to train.

The Petitioners provided substantial evidence that, before the shooting deaths of Nelson and Dominga, the City failed to train its intermediate and veteran officers in de-escalation and crisis intervention techniques (CIT) for persons with mental illness. D.P. Van Blaricom, Petitioner's expert, served in law enforcement 29 years, the last 11 years as Police Chief for the City of Bellevue in the State of Washington. (USCA5 741-43, 843-44.) He reviewed McAllen police reports, autopsy reports, use of force review, personnel files of Officers Hernandez, Hassan, Olivarez and Resendez and the officers' depositions, the National Law Enforcement Policy Center on dealing with the mentally ill, and the National Law Enforcement Policy Center's standards. (USCA5 846.) His police department had a policy in 1956 in dealing with the mentally ill and Van Blaricom has written several professional articles on this subject. (USCA5 846-48.) Van Blaricom testified that McAllen is a fair-sized community and it is known or should be known to any chief administrator that his officers are definitely going to come in contact with the mentally ill in the performance of their duties. (USCA5 822.) Dealing with the mentally ill is different than other types of police contact. "Consequently, if you expect

them to interact successfully, you provide the training. If you don't, it means you're indifferent." (USCA5 822-23.)

The City of McAllen was deliberately indifferent in its lack of training of its police officers in dealing with the mentally ill. (USCA5 973-74.) The training records of the four police officers are devoid of any training on crisis intervention or response to the mentally ill prior to this incident. (USCA5 974.) The training that was provided to one of the officers two years after the event has been a standard in the industry since at least 1997 and demonstrates that the training would have made a difference in this case. (USCA5 846-47, 974.) Standards in the industry were discussed in the summary judgment evidence. The National Law Enforcement Policy Center "NLEPC" was formed by an association between the United States Department of Justice and the International Association of Chiefs of Police. (USCA5 846-47.) NLEPC provides a standard policy for "Dealing with the Mentally Ill," which was not utilized by the City of McAllen. (USCA5 846-47, 974.)

The NLEPC standard training provides that police officers may become involved "when the affected person has created a family disturbance" and instructs that family members can "create disruption" in dealing with the mentally ill. (USCA5 974.) With particular regard to Dominga Saenz' exposure to the emotionally disturbed person, the NLEPC standard dictates that, "Due to the unpredictable nature of many mentally ill persons, when dealing with the

mentally ill, officers must be particularly conscious of their own safety and that of innocent bystanders." *Id.* Critically important information that a police officer must consider includes: "characteristics of the specific behavior"; "relationship of the subject" to others; "availability of weapons"; prior "mental health dispositions"; and the failure "to use medication that has been prescribed" which is "common among schizophrenics." *Id.* The police officers should have been trained to take "any threatening statements" seriously and that demands to be "left alone" can indicate that "the individual is close to losing control." *Id.*

Despite the existence of a statute authorizing a peace officer to enlist the aid of a citizen, and the citizen's statutory duty to obey, the City of McAllen had no policy of any nature on how or whether to enlist the aid of an untrained civilian. *See* TEX. CODE CRIM. P. art. 2.14, 2.15. Investigator Hernandez testified that there were no policies whatsoever on enlisting a third party outside of the police department to take part in a police action, family member or not. (USCA5 233-34.)

Further, the evidence demonstrates that officers predictably face situations where they must assess and interact with people with mental illness in order to prevent grave harm to the mentally ill person as well as persons in the vicinity. Police officers frequently have to interact with mentally ill subjects. (USCA5 822-23.) The failure to train officers on how to de-escalate situations involving persons with mental illness produces a "highly predictable consequence"—

that police officers will fail to respond appropriately and will actually escalate the situation and that constitutional violations will ensue.

Finally, the Petitioners provided evidence that, had the City trained its officers, the violation of constitutional rights could have been avoided. For a policy to be a moving force behind the violation of a constitutional right, the failure of the policy or omission must be "closely related to the ultimate injury." *Canton*, 489 U.S. at 391. Here, the police officers believed that they had the discretion to involve a third party outside the police department in their police action and to introduce an immediate family member into a zone of danger in the course of their warrantless arrest. Had they been trained in how to interact with a mentally ill subject, there is a reasonable probability that they would have responded differently, they would not have repeatedly banged on the door demanding that Nelson come out, they would not have called Nelson's mother to come to the scene, they would not have escorted Nelson's mother to stand at Nelson's front door with Nelson completely concealed to and barricaded from the police officers, and they would not have taken positions to ready themselves for a potential gun fight that inevitably happened due to the escalation of the situation. (USCA5 849-50.) Instead, the police officers failed to control the subject or the premises, affirmatively placed more persons at risk, caused the risk to be escalated, and engaged in a gun fight that was completely avoidable. *Id.*

Because the City failed to train its police officers in interacting with the mentally impaired, and because the City failed to train its officers on involving third parties in warrantless arrests, a reasonable jury could find that the City's "customs or policies . . . amount to deliberate indifference"; and because the City's police officers, who never received such training, failed to respond appropriately, there is sufficient evidence for a reasonable jury to find "that these customs or policies were the moving force behind the employee[s'] violation of constitutional rights." *Long v. Cnty. of Los Angeles*, 442 F.3d 1178, 1186 (9th Cir. 2006). "[W]hether a local government has displayed a policy of deliberate indifference to the constitutional rights of its citizens is generally a jury question." *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1194-95 (9th Cir. 2002).

Given the undeniable predictability that police officers will encounter persons with mental impairment while making arrests and the likelihood of constitutional violations if police officers do not consider the mentally impaired state of the subject when involving third persons, particularly family members, in the police action, the Petitioners presented genuine issues of material fact for the jury on whether the City of McAllen's failure to adopt and implement policies was deliberate indifference, and whether that deliberate indifference was a moving force behind the violation of Dominga Saenz' constitutional rights.

III. Conclusion and Prayer

The Fifth Circuit's continued refusal to recognize the "state-created danger" theory caused a dark cloud to settle over the entire case. Important legal issues and facts were lost in the fog and not addressed. The Petitioners request this Court to review this case on all grounds raised in defense of the motion for summary judgment and preserved at the Fifth Circuit Court of Appeals.

Because of the continued inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protection constitutes a violation of the individual's due process rights, and the importance of the issue to the administration of state and local governments, Petitioners request that this Court grant certiorari.

Respectfully submitted,

TRACY J. WILLI
Counsel of Record
Texas State Bar No. 00784633
JAMES N. WILLI
Texas State Bar No. 00795719
WILLI LAW FIRM, P.C.
9600 Escarpment Blvd.
Ste. 745, PMB 34
Austin, TX 78749-1983
Tel. (512) 288-3200
Fax (512) 288-3202
twilli@willilawfirm.com

Attorneys for Petitioners

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-41072

IDELMA ANA SAENZ; YOLANDA RAMIREZ; GLORIA SAENZ, Individually and as Next Friend of Diana Figueroa; DIANA FIGUEROA; JESUS HENRY SAENZ; JESUS SAENZ, Individually and as Administrator of the Estates of Dominga Saenz and Nelson Saenz,

Plaintiffs-Appellants,

v.

CITY OF McALLEN; ARMANDO HERNANDEZ; HUMBERTO RESENDEZ; ORLANDO OLIVAREZ; YASSAR HASSAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Oct. 4, 2010)

Before: JOLLY, DeMOSS, and DENNIS, Circuit Judges.

PER CURIAM:*

Appellants filed suit against the City of McAllen (the City) and the individual defendants (collectively "Appellees") for violations of 42 U.S.C. § 1983 and Texas state law, arising from the deaths of Dominga Saenz and Nelson Saenz. The magistrate judge granted the Appellees' motions for summary judgment on the § 1983 claims and motion to dismiss the state law claims. Appellants filed this appeal. Because Appellants' theory of liability supporting their §1983 claims against the individual police officers is not clearly established in this circuit, we affirm the magistrate judge's grant of summary judgment on the basis of qualified immunity. We also affirm the magistrate judge's grant of summary judgment on Appellants' municipal liability claims against the City and its dismissal of Appellants' state law claims.

I.

Nelson Saenz, Dominga's son, had a history of serious mental illness and had murdered his wife years ago.[1] In the days leading up to the events in

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Because this case involves an appeal from a grant of summary judgment, we adopt the Appellants' version of the facts to the extent supported by the evidence. *See Stewart v. Miss. Transp. Comm'n,* 586 F.3d 321, 327 (5th Cir. 2009).

question, Nelson's mental health had deteriorated. He had allegedly stopped taking his medication, acquired a gun, and threatened to kidnap certain members of his family. On September 3, 2005, Investigator Armando Hernandez, a 15-year veteran of the City's police department, and his wife, Linda Hernandez, went to Nelson's apartment for the purpose of having him committed.[2] Linda was Dominga's niece. Armando and Linda knew of Nelson's mental illness, history of violence, and deteriorating mental condition. Armando attempted to get Nelson to come outside but Nelson refused and barricaded himself in his apartment, telling Armando to "come back next week." Armando called for backup and McAllen police officers Olivarez Hassan, Humberto Resendez, and Yassar Hassan eventually arrived. Armando then developed a "plan of approach" to extract Nelson from his apartment. Dominga would knock on Nelson's front door in an attempt to coax her son to come out

---

[2] There is some discrepancy over the circumstances under which the police were summoned to Nelson's apartment. In their opening brief, Appellants assert that Armando was "requested by the family of Nelson Saenz to commit Nelson to a mental health facility," citing to Armando's deposition testimony, because "they knew [Armando] ha[d] been [a] police officer with the City of McAllen for many years and because . . . Linda [] was a relation to the family with some knowledge of Nelson's previous mental illness violence, including killing his wife with an axe." However, in the Appellants' Original and Amended Complaints, Appellants alleged that they had contacted the police department directly and had no prior notice that the Hernandezes were going to Nelson's apartment.

of his apartment while the police officers would remain in front of the house but out of Nelson's line of sight.

Armando summoned Dominga to Nelson's apartment. She arrived with her daughters Yolanda Ramirez and Idelma Saenz. Armando removed Dominga from the vehicle and pulled her to Nelson's front door, staying behind her while the other officers got in the "ready position." Yolanda, realizing that Dominga was being taken to Nelson's door in order to extract him, yelled for the police to move Dominga away from the entrance because Nelson had a gun. Nelson began yelling profanities at the police officers. Dominga attempted to get Nelson to come out of his apartment, but after no response she knelt down to pray. When Dominga started to stand, Nelson opened his door and started shooting. The police officers returned fire. Both Nelson and Dominga were killed in the exchange. Dominga was shot eleven times. Nelson's gun held only nine rounds. Appellants submitted expert testimony evidencing that Dominga was shot at least four times by the officers' weapons.

Appellants filed suit in the United States District Court for the Southern District of Texas against the individual police officers pursuant to 42 U.S.C. § 1983 under the "state created danger theory," alleging that the police officers knowingly created a dangerous environment that would not have existed but for the officers' actions. Appellants also filed claims against the City pursuant to 42 U.S.C. § 1983, alleging that the City promoted a "shoot first, ask questions later"

policy within its police department, and filed Texas state law claims against all Appellees for bystander recovery and violations of the Texas Torts Claims Act. The parties consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c) (2009); FED. R. CIV. P. 73(a).

The City filed a motion to dismiss, *inter alia,* Appellants' state law claims, which was granted.[3] Appellees filed separate motions for summary judgment on the various § 1983 claims, both of which were granted. Appellants timely appealed.

II.

This court reviews the grant of summary judgment based on qualified immunity de novo, applying the same standard as the magistrate judge. *See Mongrue v. Monsanto Co.,* 249 F.3d 422, 428 (5th Cir. 2001); FED. R. CIV. P. 56.

Section 1983 provides a cause of action for individuals who have been "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws" of the United States by a person or entity acting under color of state law. 42 U.S.C. § 1983 (2003). The doctrine of qualified immunity protects government officials from liability for civil damages

---

[3] The magistrate judge also dismissed Appellees' state law claims against the individual defendants which has not been appealed.

insofar as their conduct (1) does not violate a constitutional right and (2) was not objectively unreasonable in light of clearly established law at the time of the violation. *Pearson v. Callahan,* 129 S. Ct. 808, 815-16 (2009). This court may address either prong first. *Id.* at 818 (*overruling in part Saucier v. Katz,* 533 U.S. 194 (2001)).

A.

When determining whether a constitutional right was clearly established, this court asks whether the right was clearly established at the time of the conduct, which for this matter is 2005. *See Lytle v. Bexar Cnty., Tex.,* 560 F.3d 404, 417 (5th Cir. 2009). A right is clearly established when "the contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right." *Wernecke v. Garcia,* 591 F.3d 386, 392 (5th Cir. 2009) (quotations and citation omitted). Our inquiry focuses on whether the officials were on notice that their conduct violates clearly established law and that the state of the law provided fair warning that their conduct was unconstitutional. *See Hope v. Pelzer,* 536 U.S. 730, 740-41 (2002). "[A] defendant's acts are held to be objectively reasonable unless *all* reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff." *Thompson v. Upshur Cnty., Tex.,* 245 F.3d 447, 457 (5th Cir. 2001) (emphasis in original).

Appellants allege a "state created danger theory" as the basis of liability for their § 1983 claims against the individual defendants. Generally, "a state official has no constitutional duty to protect an individual from private violence." *McClendon v. City of Columbia,* 305 F.3d 314, 324 (5th Cir. 2002) (en banc) (per curiam) (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.,* 489 U.S. 189, 197 (1989)). However, the Supreme Court has held that where the state, "through the affirmative exercise of its powers, acts to restrain an individual's freedom . . . 'through incarceration, institutionalization, or other similar restraint of personal liberty,' the state creates a 'special relationship' between the individual and the state which imposes upon the state a constitutional duty to protect that individual from dangers, including, in certain circumstances, private violence." *Id.* (quoting *DeShaney,* 489 U.S. at 200). Some circuit courts have read *DeShaney* to imply a second exception, the state created danger theory, to the general rule against state liability for private violence.[4] In this circuit, the

---

[4] *See, e.g., Okin v. Village of Cornwall-On-Hudson Police Dep't,* 577 F.3d 415, 434-35 (2d Cir. 2009); *Waddell v. Hendry Cnty. Sheriff's Office,* 329 F.3d 1300, 1306-07 (11th Cir. 2003); *Ruiz v. McDonnell,* 299 F.3d 1173, 1182-84 (10th Cir. 2002); *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1066-67 (6th Cir. 1998); *Kneipp v. Tedder,* 95 F.3d 1199, 1201, 1208 (3d Cir. 1996); *Reed v. Gardner,* 986 F.2d 1122, 1125 (7th Cir. 1993); *Freeman v. Ferguson,* 911 F.2d 52, 54-55 (8th Cir. 1990); *Wood v. Ostrander,* 879 F.2d 583, 589-90 (9th Cir. 1989); *Butera v. Dist. of Columbia,* 235 F.3d 637, 651 (D.C. Cir. 2001); *but see Velez-Diaz v. Vega-Irizarry,* 421 F.3d 71, 80 & n.3 (1st Cir. 2005) (noting

(Continued on following page)

availability of the state created danger theory as the basis of liability for a § 1983 claim is far less certain. In *Leffall v. Dallas Independent School District,* 28 F.3d 521, 530-32 (5th Cir. 1994), this court discussed the state created danger theory and set forth the elements necessary to establish the claim as a basis for liability, but ultimately held that even if the state-created danger theory was constitutionally sound, the plaintiff failed to meet the necessary elements. Subsequent § 1983 cases predicated on the state created danger theory similarly pretermit the issue.[5]

---

that the First Circuit has discussed the state created danger theory but never found it actionable on the facts alleged) (quotations omitted); *Pinder v. Johnson,* 54 F.3d 1169, 1175 (4th Cir. 1995) (finding that the state created danger theory did not apply absent a custodial relationship).

[5] *See, e.g., Bustos v. Martini Club, Inc.,* 599 F.3d 458, 466 (5th Cir. 2010) ("[T]his circuit has not adopted the state-created danger theory."); *Luevano v. Geyer,* 355 F. App'x 834, 836 (5th Cir. 2009) ("We have repeatedly declined to rule on whether the state-created danger theory applies in this Circuit, but have found that even if it did apply, it would not allow recovery for the plaintiff under the facts of the case at hand."); *Hale v. Bexar Cnty., Tex.,* 342 F. App'x 921, 925-27 (5th Cir. 2009) (declining to apply the state created danger theory because this court had never expressly done so and even if available the plaintiff had not met the elements of the claim); *Lester v. City of College Station,* 103 F. App'x. 814, 814-816 (5th Cir. 2004) ("[T]his court has neither adopted nor accepted the state-created-danger theory of liability."); *Greene v. Plano Indep. Sch. Dist.,* 103 F. App'x 542, 543-544, & n.3 (5th Cir. 2004) ("This Court . . . has never held that the state created danger theory is one of the limited circumstances that would rise to the level of a due process constitutional violation contemplated in *DeShaney.*");

(Continued on following page)

On two occasions this court explicitly adopted the state created danger theory but was ultimately reversed. *See McClendon,* 258 F.3d at 436 (noting that the Fifth Circuit had "continued to recognize the existence of the theory" and thus applying the theory), *rev'd en banc,* 305 F.3d at 325 (holding that "neither this court nor the Supreme Court has yet determined whether a citizen has a constitutional right to be free from state-created dangers" and because the plaintiff failed to establish the necessary elements of the theory it would not apply even if available); *Breen v. Tex. A&M Univ.,* 485 F.3d 325, 337 (5th Cir. 2007) (holding that the state created danger theory was "a valid basis for a claim on the set of facts alleged"), *rev'd,* 494 F.3d 516 (5th Cir. 2007) (granting rehearing *sua sponte* and issuing a subsequent opinion omitting discussion of state created

---

Rivera v. Houston Indep. Sch. Dist., 349 F.3d 244, 249 (5th Cir. 2003) ("We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. . . . We again decline to do so."); *Piotrowski v. City of Houston,* 237 F.3d 567, 584-85 (5th Cir. 2001) (recognizing that the state created danger theory had not been explicitly adopted by this court and declining to do so in that matter because plaintiff had not met the elements of the theory); *Randolph v. Cervantes,* 130 F.3d 727, 731 (5th Cir. 1997) (same); *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc) (same); *see also Walton v. Alexander,* 44 F.3d 1297, 1306 (5th Cir. 1995) (holding that absent a special relationship between the state actor and the individual, the "state has *no duty* to protect nor liability from failing to protect a person under the due process clause of the Fourteenth Amendment from violence at the hands of a private actor") (emphasis added).

danger theory); *see also Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249 n.5 (5th Cir. 2003) (recognizing that the panel's decision in *McClendon* "was vacated and with it our recognition of the [state created danger] theory"). Thus, this court's stance on the state created danger theory as a basis of liability for a § 1983 claim is uncertain.

Further, we have found that the state created danger theory was not clearly established for conduct that occurred in 1993. *See McClendon*, 305 F.3d at 332-33. More recently this court has held that the state created danger theory is "not clearly established law within this circuit such that a § 1983 claim based on this theory could be sustained" for an incident that occurred in 2006. *See Walker v. Livingston*, No. 09-20508, 2010 WL 2465035, *2 (5th Cir. June 17, 2010) (unpublished) (citing *Morin v. Moore*, 309 F.3d 316, 321 (5th Cir. 2002)).

Although this court may consider the law of other circuits when determining whether a constitutional right is clearly established, "[t]he reluctance of this court . . . to embrace some version of the state-created danger theory despite numerous opportunities to do so suggests that, regardless of the status of this doctrine in other circuits, a reasonable officer in this circuit would, even [in 2002], be unclear as to whether there is a right to be free from 'state-created danger.'" *McClendon*, 305 F.3d at 332 n.12. "[T]his circuit is littered with opinions expressing varying levels of skepticism." *Id.* This circuit's holdings on the viability

of the state created danger theory following *McClendon* do not make its position any clearer. *See, e.g., Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 422-23 (5th Cir. 2006) ("[N]either the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof. We have, however, many times refused to allow recovery sought to be predicated thereunder."); *Longoria v. Texas*, 473 F.3d 586, 593 n.8 (5th Cir. 2006) ("Since [2003], we have explicitly rejected [the state created danger] theory of liability."); *Hernandez ex rel. Hernandez v. Tex. Dep't. of Protective and Regulatory Servs.*, 380 F.3d 872, 880 n.1 (5th Cir. 2004) ("We emphasize that our court has not yet determined whether a state official has a . . . duty to protect individuals from state-created dangers.") (quotation and citation omitted); *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) ("This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented.").

"[Q]ualified immunity should be granted 'if a reasonable official would be left uncertain of the law's application to the facts confronting him.'" *McClendon*, 305 F.3d at 332 (quoting *Salas v. Carpenter*, 980 F.2d 299, 311 (5th Cir. 1992) (citation omitted). The state created danger theory has not been applied in this circuit with "obvious clarity" to the specific conduct in question such that a reasonable officer would be aware that his actions were unlawful. *See id.* Because the state created danger theory as a basis

of liability was not clearly established at the time the incident occurred, the individual defendants are entitled to qualified immunity.[6]

B.

Appellants also appeal the magistrate judge's grant of summary judgment to the City on the basis of qualified immunity. A municipality is a "person" subject to suit under § 1983. *See Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 690 (1978). "[M]unicipal liability under section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citation omitted). "Municipal liability requires deliberate action attributable to the municipality that is the direct cause of the alleged constitutional violation." *Zarnow v. City of Wichita Falls, Tex.*, ___ F.3d ___, 2010 WL 3093443, *3 (5th Cir. August 9,

---

[6] Appellants asserted in their complaints and appellate briefs, and conceded at oral argument, that their claim was brought pursuant to *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989). Appellants now allege a second basis for liability under the "special relationship" theory. Because Appellants raise the "special relationship" theory of liability for the first time on appeal, this court will not consider them. *See Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 316-17 (5th Cir. 2000) (holding that this court does not consider claims not raised before the district court).

2010) (citing *City of Canton, Ohio v. Harris,* 489 U.S. 378, 391-92 (1989)).

Appellants assert that the City "ratified and approved" the actions of the individual defendants by way of its determination, following a review of the incident, that the police officers did not "breach[ ]" any City police department rules. The magistrate judge held that Appellants' response to the City's motion for summary judgment on this point was "vague," and because Appellants failed to establish a causal link between the department's alleged policy and the constitutional violation, the City was entitled to qualified immunity.

"If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127 (1988). Moreover, "a policymaker who defends conduct that is later shown to be unlawful does not necessarily incur liability on behalf of the municipality." *Peterson v. City of Fort Worth, Tex.,* 588 F.3d 838, 848 (5th Cir. 2009) (citing *Coon v. Ledbetter,* 780 F.2d 1158, 1161-62 (5th Cir. 1986)). Appellants have not established a genuine issue of material fact as to whether the City's review of the officers' conduct violated department rules rises to the level of ratification such that the City is

liable for the officers' conduct. Thus, the City is entitled to qualified immunity.[7]

III.

Finally, Appellants assert that the magistrate judge erred in dismissing their Texas state law claims against the City. This court reviews de novo a Rule 12(b)(6) dismissal. *See Lindquist v. City of Pasadena, Tex.*, 525 F.3d 383, 386 (5th Cir. 2008). The interpretation of a statute is a question of law we also review de novo. *See Motient Corp. v. Dondero*, 529 F.3d 532, 535 (5th Cir. 2008).

Under the doctrine of sovereign immunity, a unit of state government is immune from suit and liability unless the State has waived immunity. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). The magistrate judge properly dismissed Appellants' claims for relief pursuant to Texas Civil Practice & Remedies Code § 71.002, as that statute does not waive governmental immunity. *See* TEX. CIV. PRAC. & REM.

---

[7] Appellants also raised municipal liability claims based on the City's alleged "shoot first ask questions later" policy and alleged failure to train its police officers and adopt department policies on the proper way to handle situations involving mentally ill persons. Because Appellants failed to raise its claim against the City's policy on appeal, we deem it forfeited. *See Davis v. Maggio*, 706 F.2d 568, 571 (5th Cir. 1983) ("Claims not pressed on appeal are deemed abandoned."). Appellants' allegations that the City failed to train and adopt appropriate policies were raised for the first time on appeal and are likewise forfeited. *See Stewart Glass & Mirror*, 200 F.3d at 316-17.

CODE ANN. § 71.001-002 (West 2003) (permitting liability for "persons," defined as "an individual, association of individuals, joint-stock company, or corporation or a trustee or receiver of an individual, association of individuals, joint-stock company, or corporation.").[8]

IV.

For the foregoing reasons, the magistrate judge's grant of summary judgment as to all Appellees and grant of the City's motion to dismiss is affirmed.

AFFIRMED.

---

[8] Appellants also filed state law claims against the City pursuant to the Texas Tort Claims Act. Appellants make no argument on appeal as to the magistrate judge's dismissal of these claims. As such, they have been forfeited. *See Davis*, 706 F.2d at 571. ,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

IDELMA ANA SAENZ, et al. Plaintiffs	§ §	
vs.	§	CIVIL ACTION
THE CITY OF MCALLEN, et al.	§	NO. M-06-352
Defendants	§	

MEMORANDUM OF DECISION AND ORDER

(Filed Sep. 28, 2007)

Plaintiffs filed this action pursuant to 42 U.S.C. § 1983 and Texas state law on November 20, 2006. Pending before the Court is the City of McAllen's Motion to Dismiss Plaintiffs' complaint on the grounds that it fails to state a claim upon which relief can be granted, pursuant to Rule 112(b)(6) of the Federal Rules of Civil Procedure. (Dkt. Entry No. 2.) Defendant does not move in the alternative for summary judgment. Plaintiffs filed a response to Defendant's motion, and Defendant filed a reply to the response. For the reasons set forth below, the motion is granted in part and denied in part.

I. Jurisdiction

This case is before the undersigned by consent of the parties pursuant to 28 U.S.C. § 636(c). The Court has subject matter jurisdiction over the claims

asserted in this action. *See* 28 U.S.C. § 1367(a) (supplemental); 42 U.S.C. § 1983 (federal question).

II. Plaintiffs' Statement of the Facts

Plaintiffs are family members of Nelson Saenz, deceased, and Dominga Saenz, deceased. Pursuant to the second amended complaint (Dkt. Entry No. 23), Plaintiffs allege that on or around September 3, 2005, Defendant Officers went to the apartment of Nelson Saenz for the purpose of sectioning him to the care of the local Mental Health and Mental Retardation Authority. According to Plaintiffs, the Police Department and Officers knew Nelson Saenz possessed a gun, was armed and dangerous, and had a history of homicide and mental illness. Once at the apartment complex, the police department contacted Dominga Saenz, Nelson Saenz's mother, and asked for her assistance at the scene. Dominga arrived at the apartment complex with Idelma Ana Saenz and Yolanda Ramirez, relatives of Dominga and Nelson Saenz. Plaintiffs allege that the Officers were wearing bullet proof vests at the apartment complex. Defendant Officers were also armed and positioned in front of Nelson Saenz's apartment. Nelson Saenz was armed as well.

Upon Dominga Saenz's arrival, Plaintiffs allege that Defendant Officers positioned Dominga Saenz in the line of fire in the area around the entrance to Nelson Saenz's apartment, using her as a "human shield" between themselves and Nelson Saenz.

Defendants did not provide Dominga Saenz with a bullet proof vest. While Dominga Saenz was in the entrance area, Yolanda Ramirez pulled Idelma Ana Saenz out of the surrounding entrance area to a safer area down a path. At about this same time, gunfire was exchanged between Defendant Officers and Nelson Saenz. Both Nelson and Dominga Saenz were shot during the gunfire. Nelson Saenz died at the scene, and Dominga Saenz died later that night at the local hospital.

III. Plaintiffs' Claims

A. Defendant Officers

Pursuant to 42 U.S.C. § 1983, Plaintiffs allege liability against Defendant Officers in their individual capacities for violating Dominga Saenz's constitutional rights under a state-created danger theory. (Dkt. Entry No. 23 at 6-7.)

B. City of McAllen

Plaintiffs allege municipal liability pursuant to 42 U.S.C. § 1983 for Dominga Saenz's death. Plaintiffs allege that the McAllen Police Chief's "shoot first, ask questions later" policy is sufficient to state a claim against Defendant City under *Monell v. Dep't. of Social Svcs.*, 436 U.S. 658 (1978). (Dkt. Entry Nos. 20; 23 at 7.) Plaintiffs also claim liability against Defendant City under the Texas Tort Claims Act for the deaths of Nelson Saenz and Dominga Saenz.

IV. Standard of Review

Rule 8 of the Federal Rules of Civil Procedure requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. The rules does not require or impose a heightened pleading standard for section 1983 actions against a municipality. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is "viewed with disfavor and is rarely granted." *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 365 (5th Cir. 2000); *see also Lowrey v. Texas A & M Univ. System*, 117 F.3d 242, 247 (5th Cir. 1997) (quoting *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982)). Fifth Circuit law dictates that a district court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *See Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996); *see also Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). "The determining issue is not whether the plaintiff will ultimately prevail on the merits, but whether he is entitled to offer evidence to support his claim." *Preister v. Lowndes Co.*, 354 F.3d 414, 418 (5th Cir. 2004) (citing *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999)). The court may not look beyond the pleadings in ruling on the motion. *Baker*, 75 F.3d at 196 (citing *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992)).

A complaint *may* be subject to dismissal for failure to state a claim even in the absence of an appearance, beyond a doubt, that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1968-69 (2007) (emphasis added), *abrogating Conley v. Gibson*, 355 U.S. 41 (1957). "To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (citing *Twombly*, 127 S. Ct. at 1974). "'Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Id.* (quoting *Twombly*, 127 S. Ct. at 1965). Liberal or deferential pleading considerations do not extend to "conclusory allegations or unwarranted deductions of fact." *Collins*, 224 F.3d at 498. "[D]ismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995).

V. Applicable Law & Analysis

A. Section 1983 Claim

Title 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

> Columbia, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. To state a claim under section 1983, the plaintiff must allege a deprivation of a federal right by a person acting under color of state law. *Gomez v. Toledo,* 446 U.S. 635, 640 (1980).

1. State-Created Danger Theory

Defendant City challenges the viability of the alleged due process violation against Dominga Saenz, which is premised on a state-created danger theory. (Dkt. Entry No. 2 at 3-4.) In *DeShaney v. Winnebago County Dep't of Soc. Servs.,* 489 U.S. 189, 196-97 (1989), the Supreme Court of the United States stated that "[a]s a general matter . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." At the same time, the Court also recognized two potential exceptions. The first concerns special or custodial relationships. *Deshaney,* 489 U.S. at 200. The Supreme Court has states the general rule as follows: "When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his

safety and well-being." *Id.* The second exception concerns the creation of a duty to protect individuals from harm when the state actor's actions creates or exacerbates a danger to an individual. *DeShaney*, 489 U.S. at 201; *Johnson v. Dallas Independent School Dist.* 38 F.3d 198, 200 (5th Cir. 1994) ("When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state 'custody.'"). This second *DeShaney* exception is often referred to as the "state-created danger" theory. *See Morin v. Moore,* 309 F.3d 316, 321-24 (5th Cir. 2002) (discussing this theory of section 1983 liability).

In order to recover on a state-created danger claim, the plaintiff must show that the harm to the plaintiff resulted because (1) the state actors created or increased the danger to the plaintiff; and (2) the state actor acted with deliberate indifference toward the plaintiff. *Id.* at 323 (citations omitted). A successful claim also requires a showing of an identifiable or foreseeable victim. *See Saenz v. Heldenfels Bros., Inc.,* 183 F.3d 389, 391-92 (5th Cir. 1999) (stating that the state-created danger theory is "inapposite without a known victim"). Deliberate indifference means that a state actor must know of and disregard an excessive risk to the victim's health or safety." *McClendon v. City of Columbia,* 305 F.3d 314, 326 n.8 (5th Cir. 2002) (citations and quotations omitted). "[T]o establish deliberate indifference, the plaintiff must show

the 'environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have have existed for the third party's crime to occur.'" *Piotrowski v. City of Houston,* 237 F.3d 567, 585 (5th Cir. 2001) (citing *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198, 201 (5th Cir. 1994)). "The state actor's actual knowledge is critical to the inquiry." *McClendon,* 305 F.3d at 326 n.8. "A state actor's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, does not rise to the level of deliberate indifference. *Id.* (citations and quotations omitted).

As briefed by the parties and recognized by this Court, the viability of a constitutional violation premised on the state-created danger doctrine has not always been clear under Fifth Circuit case law, as captured in published and unpublished cases. *See Breen v. Texas A&M Univ.,* 485 F.3d 325 (5th Cir. 2007), *amended on rehearing in part by Breen v. Texas A&M Univ.,* 494 F.3d 516 (5th Cir. 2007) (per curiam) (withdrawing and deleting "Section IIIA, including its subsections 1 through 3, of the panel opinion, found at 485 F.3d 325, 332-38 (5th Cir. 2007), along with footnote 14"), *petition for cert. filed,* 76 U.S.L.W. 3050 (U.S. Jul 23, 2007) (No. 07-87). *Breen* is the most recent published opinion from the Fifth Circuit on the state-created danger theory. *See id.* at 339 (holding that at a minimum, this theory of recovery was not clearly established law in the Fifth Circuit in November of 1999 for the purposes of a

qualified immunity analysis). In *Breen,* the Fifth Circuit acknowledged that it has previously set forth the elements of a state-created danger claim but that it has never held that this is a cognizable claim or valid legal theory. *Id.* at 340. Since the parties briefed the *Breen* case, the *Breen* panel, on *sua sponte* rehearing, withdrew and deleted the portion of the original *Breen* decision in which the panel arguably endorsed or adopted this theory of recovery. *Breen v. Texas A&M University,* 494 F.3d 516, 518 (5th Cir. 2007). Notwithstanding the lack of express adoption of this theory of recovery in this circuit, the Court agrees with Plaintiffs that the Fifth Circuit case law, including the *Breen* case as amended and the cases cited therein, supports the conclusion that a section 1983 claim premised on it is not dismissable *per se* at the motion-to-dismiss stage under 12(b)(6) for failure to state claim in relation to basic pleading, which Defendant's motion to dismiss is currently challenging. *Cf. Rios v. City of Del Rio Tex.*, 444 F.3d 417, 421-25 (5th Cir. 2006) (reviewing prior case law and emphasizing that earlier decisions expressly declined to adopt the state-created danger theory, but concluding that the facts alleged in the complaint, taken in the light most favorable to plaintiffs and assuming arguendo that the theory is valid, did not amount to a constitutional violation under prior case law); *McClendon,* 305 F.3d at 326 (5th Cir. 2002) (assuming that the theory is valid, the court concluded that the summary judgment record did not reveal a violation of substantive due process rights under this theory of recovery).

The Court concludes that Plaintiffs have sufficiently alleged a requisite constitutional violation under section 1983 for the purposes of Rule 8 and 12(b)(6), According to Plaintiffs, the Defendants' culpability begins with the police (state actors) calling Dominga Saenz to the scene to assist police with her son – a scene which already involved a show of potentially deadly force. Once Dominga Saenz arrived at the scene, the police allegedly positioned her, or played a role in positioning her, in or around the potential line of fire between her son, who was armed, and the police, who were armed, in an already escalating situation. The Court concludes that these affirmative acts by police (as opposed to a mere failure to protect, such as providing Dominga Saenz with a bullet proof vest or arriving at a scene in which Dominga Saenz was already imperiled, *cf. Reed v. Gardner,* 986 F.2d 1122, 1125 (7th Cir. 1993) ("Inaction by the state in the face of a known danger is not enough to trigger the obligation [to protect private citizens under the Constitution]"), are sufficient to allege that Defendants' actions created *or* increased the danger to Dominga Saenz. The Court also concludes that Plaintiffs allege sufficiently deliberate indifference toward the plaintiff. Construed in a light most favorable to them, Plaintiffs' allegations that Defendants knew Nelson Saenz was armed, knew Nelson Saenz had a history of mental illness and homicidal behavior, arrived at Nelson Saenz's apartment to section him to the care of mental health authorities, geared themselves up with bullet proof vests and defensive weapons, asked

Dominga Saenz to come to the scene and, once there, introduced her into a escalating scene involving the potential use of deadly force, and engaged in gunfire exchange in her presence are sufficient to allege, at a minimum, that Defendants knew of and disregarded an excessive risk to Dominga Saenz's health or safety. These allegations, if proven to be true, might establish that Defendants created a dangerous situation, that they knew it was dangerous, and that they used their authority to create an opportunity for the shooting to occur that might not otherwise have existed. Finally, Plaintiffs allege sufficiently that Dominga Saenz is the identifiable victim – in other words, a foreseeable and particular victim. In sum, Plaintiffs sufficiently allege a constitutional violation under the state-created danger theory by persons acting under the color of state law for the purposes of section 1983.

2. Defendant Officers

With that conclusion, the Court observes that Defendant's Motion to Dismiss does not address the section 1983 claims against the officers in their individual capacity, as Defendant Officers were added subsequently in the second amended complaint. The Court abstains from making any rulings on the individual officers at this time.

3. Municipal Liability

Plaintiffs allege municipal liability under section 1983. Plaintiffs allege that the Police Chief's "shoot

first, ask questions later" policy represents the City's custom or policy. (Dkt. Entry No. 23.) Defendant argues that Plaintiffs fail to state a claim for municipal liability because they failed to identify a custom or policy and failed to plead a pattern of widespread, similar incidents. (Dkt. Entry No. 2 at 5.)

Municipalities and cities qualify as persons liable to suit under § 1983. *Meadowbriar Home for Children, Inc. v. Gunn,* 81 F.3d 521, 532-33 (5th Cir. 1996). However, municipalities may only be held liable if the constitutional harm suffered the result of an "official policy, custom, or pattern." *Monell v. Dep't. of Social Svcs,* 436 U.S. 658, 692-94 (1978). "Under the decisions of the Supreme Court and this court, municipal liability under section 1983 requires proof of three elements: a policymaker; an official policy or custom; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell,* 436 U.S. at 694). To support a claim based upon the existence of an official custom or policy, the plaintiff must plead facts which show that: 1) a policy or custom existed; 2) the governmental policy makers actually or constructively knew of its existence; 3) a constitutional violation occurred; and 4) the custom or policy served as the moving force behind the violation. *Meadowbriar,* 81 F.3d at 532-33 (citing *Palmer v. City of San Antonio,* 810 F.2d 514, 516 (5th Cir. 1987)).

Municipal liability may not be predicated on *respondeat superior* because the text of section 1983

will not bear such a reading. *Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir. 2001) (citing *Bd. of* Comm's *of Bryan County v. Brown,* 520 U.S. 397, 403 (1997)). "[T]he unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur; isolated unconstitutional actions by municipal employees will almost never trigger liability." *Id.* (citing *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984), *McKee v. City of Rockwall,* 577 F.2d 409, 415 (5th Cir. 1989)).

Official policy is:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by a official to whom the lawmakers have delegated policy-making authority; or

2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984). Official policy does not necessarily require formal approval through the body's official decision making channels. *Monell,* 436 U.S. at 690-91. Where

a plaintiff bases municipal liability on the latter definition of official policy, the plaintiff must show that "the relevant practice is so widespread as to have the force of law." *Brown,* 520 U.S. at 404. Evidence of an isolated incident is generally insufficient to establish a custom. *Pineda v. City of Houston,* 291 F.3d 325, 329 (5th Cir. 2002).

"Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Brown,* 520 U.S. at 405. Accordingly, in addition to establishing the existence of an illegal custom, a plaintiff must also demonstrate that the municipal policymakers are actually or constructively aware of the custom. *Pineda,* 291 F.3d at 330-31. Additionally, a plaintiff must establish that the municipality promulgated the custom with "deliberate indifference to the 'known or obvious consequences' that constitutional violations would result." *Piotrowski,* 237 F.3d at 579 (quoting *Brown,* 520 U.S. at 407).

The Supreme Court and Fifth Circuit have recognized that a municipality may be subject to § 1983 liability if the municipality's policies regarding employee training or supervision are inadequate, and the resulting lack of training or supervision led to a constitutional violation. *E.g., City of Canton v. Harris,* 489 U.S. 378 (1989); *Brown v. Bryan County,* 219 F.3d 450 (5th Cir. 2000). The Supreme Court has

emphasized that the inadequacy of police training may serve as basis for § 1983 municipal liability only where failure to train amounts to deliberate indifference to rights of persons with whom police come into contact. *Harris,* 489 U.S. at 392. To prevail on a failure to train claim, a plaintiff must show "(1) the training or hiring procedures of the municipality's policymaker were inadequate, (2) the municipality's policymaker was deliberately indifferent in adopting the hiring or training policy, and (3) the inadequate hiring or training policy directly caused the plaintiff's injury." *Baker,* 75 F.3d at 199. "In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." *City of Canton,* 489 U.S. at 390. Further, [t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *Id.* at 390-91.

"A municipality acts with 'deliberate indifference' in adopting an otherwise constitutional policy if 'in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'" *Benavides v. County of Wilson,* 955 F.2d 968, 972 (5th Cir. 1992) (citing *City of Canton,* 109 S. Ct. at 1205). The Fifth Circuit has stated "that proof a single violent incident

ordinarily is insufficient to hold a municipality liable for inadequate training." *Snyder v. Trepagnier,* 142 F.3d 791, 798 (5th Cir. 1998) (citations omitted). However, under the "single incident exception," a single violation of federal rights may be sufficient to hold a municipality liable for inadequate training where there is "proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights and the need for additional or different police training." *Gabriel v. City of Plano,* 202 F.3d 741, 745 (5th Cir. 2000).

As an initial matter, the Court begins with the parties' dispute over whether Plaintiffs are required to allege a policy or custom in order to state a claim for municipal liability when the claim is premised on the state-created danger exception. Plaintiffs argue that they are not required to meet the requirements of *Monell* under this *DeShaney* exception, and, if they do, they allege one. Defendant argues that Plaintiffs must allege the *Monell* elements in order to state a claim for municipal liability, regardless of the nature of the underlying constitutional violation.

The Court agrees with Defendant's argument. An illustrative case on this issue is *Rivera v. Houston Independent School Dist.,* 349 F.3d 244 (5th Cir. 2003). In *Rivera,* a student was killed by another student in a gang-related fight. *Id.* at 246. The parents filed a section 1983 action against the school district. *Id.* One ground advanced by the parents was a "state-created danger" theory by which they argued that the school district should be held liable for due

process violations against their son. *Id.* The Fifth Circuit affirmed the district court's grant of summary judgment in favor of the school district. *Id.* at 250. Setting forth the *Monell* requirements for municipal liability, the Fifth Circuit discussed the parents' arguments that the school district's liability stemmed not from an enunciated policy, but from a custom of tolerating gang activity which increased the danger to their son. *Id.* at 249. The court reasoned that this argument failed because, even if this custom existed, the parents failed to show that the board had actual or constructive knowledge of it. *Id.* Further, even assuming the board did not combat gang activity enough, the court concluded that the parents could not show that the board was deliberately indifferent to the danger that the gang activity might have posed to the student who was killed. *Id.* at 250. Finally, the court reasoned that the parents failed to show that the "Board affirmatively placed Avila in a position of danger, namely in the situation where [the offending student] was a greater threat to him than he would have been otherwise." *Id.* at 250. In sum, the court held that parents "failed to identify either a policy or custom of the HISD Board of Trustees that 'created an opportunity that would not otherwise have existed' for the son's killing." *Id.*[1]

---

[1] The analytical legal model in *Rivera* differs slightly from this instant action. That is, in *Rivera*, the parents alleged a constitutional violation based, in relevant part, on the school Board's failure to protect the students, whereas this instant

(Continued on following page)

Cited by Defendant, *Piotrowski v. City of Houston*, 237 F.3d 567, 580 (5th Cir. 2001), is another illustrative Fifth Circuit case on the requirements underlying municipal liability. In an extensive discussion of the fundamental elements of municipal liability, the Fifth Circuit emphasized that "[t]he three attribution principles identified [for municipal liability] – a policymaker, an official policy and the 'moving force' of the policy – are necessary to distinguish individual violations perpetrated by local government employees from those that can be fairly identified as actions of the government itself. *Id.* at 578. In other words, regardless of the theory of recovery being advanced, plaintiffs are required to allege (and subsequently establish) the essential *Monell* requirements for municipal liability to ensure, at a minimum, that municipal liability does not "collapse" into respondeat superior or vicarious liability. *See id.*, at 580.

Not only do Plaintiffs fail to point to any precedential case law in support of their argument that they are not required to allege a policy or custom, the cases just discussed undermine Plaintiffs' argument that *Monell* does not apply when the constitutional violation is based on a state-created danger theory. Supreme Court and Fifth Circuit precedent direct that, to state a claim for municipal liability, Plaintiffs must state the requirements set forth in *Monell* and

---

action focuses on affirmative acts by the municipal officers that resulted in the alleged, underlying constitutional violation.

subsequent, related case law. *See, e.g., Collins v. City of Harker Heights,* 503 U.S. 115, 120 (1992) (stating that a section 1983 claim against a municipality is comprised of two issues: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation").

Turning to Plaintiffs' pleading, the Court concludes that Plaintiffs do *not* fail to state claim for municipal liability against City Defendant. First, Plaintiffs allege that City Defendant has a "shoot first, ask questions later" policy, which the Plaintiffs indicate is interrelated to inadequate training of municipal police officers in responding to deadly force situations with mentally ill or disabled individuals. (Dkt. Entry No. 23 at 7.) Although Defendant argues that Plaintiffs fail to allege or identify the "policy or custom" component of the claim, this argument is baseless insofar as Plaintiffs allege the aforementioned policy in relation to the alleged constitutional violation premised on the state-created danger exception. Second, Plaintiffs identify the policymaker – the police chief, whose alleged status as policymaker Defendant does not currently challenge – and, in turn, Plaintiffs allege the requisite actual or constructive knowledge of this policy or custom. Finally, Plaintiffs allege sufficiently that this policy is the causal link that resulted in Dominga Saenz's death, *i.e.,* that the "shoot first, ask questions later" policy was the moving force behind the alleged constitutional violation under *DeShaney.* Accepting Plaintiffs' well-pleaded facts as true and viewing them in the

light most favorable to Plaintiffs, the Court finds that these allegations suffice to state a claim for municipal liability.

Plaintiffs allege that the "shoot first, ask questions later" is an official policy promulgated by an official to whom the lawmakers have delegated policy-making authority or whose acts or edicts fairly represent those of the municipality. (Dkt. Entry No. 20 at 3.) Defendant contends that Plaintiffs fail to allege a pattern of similar incidents that is general or widespread. *See Pineda v. City of Houston,* 291 F.3d 325, 329 (5th Cir. 2002). Plaintiffs allege that this requirement only applies to claims involving a "custom," not claims involving a "policy." (Dkt. Entry No. 20 at 3.) Contrary to Defendant's contention, the Court finds that Plaintiffs sufficiently state a policy for the purposes of stating a municipal liability claim against Defendant City, notwithstanding the absence of an allegation of a widespread or general pattern of similar incidents.

After consideration of the grounds or defects alleged by Defendant in its motion to dismiss, as applied to Plaintiffs' second, amended complaint, the Court concludes that Plaintiffs sufficiently state a claim for municipal liability. *Cf. Mack v. City of Abilene,* 461 F.3d 547, 556 (5th Cir. 2006) (concluding that the plaintiff's simplistic identification of the municipal's policy or custom and other elements for municipal liability were adequate to state a claim under the liberal pleading standard of Rule 8) (citing *Leatherman,* 507 U.S. at 168). Accordingly,

Defendant's motion for dismissal of the municipal liability claim against Defendant City will be denied.

B. Texas Tort Claims Act

Pursuant to the Texas Tort Claims Act, Plaintiffs allege liability for personal injury and proximately caused by the wrongful act or omission or negligence of an employee acting within the scope of his employment for injuries or death caused by the use of tangible personal property. Specifically, Plaintiffs claim liability for the shooting death of Nelson Saenz and for failing to provide a bullet proof vest to Domingo Saenz, who later died from gunshot wounds. (Dkt. Entry No. 23 at 6.) Plaintiffs do not assert any state law claims against the officers in their individual or official capacities. (*See id.*)

This Court must apply Texas substantive law with regard to these claims. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938). "In making an *Erie* determination, "[w]e are emphatically not permitted to do merely what we think best; we must do that which we think the [Texas] Supreme Court would deem best.'" *Morin,* 309 F.3d at 324 (quoting *Jackson v. Johns-Manville Sales Corp.,* 781 F.2d 394, 397 (5th Cir. 1986) (en banc)).

1. Mother

Plaintiffs allege liability for the death of Dominga Saenz. Specifically, Plaintiffs allege liability

under the Act for Defendant City's failure to provide a bullet proof vest to Dominga Saenz during the events preceding her shooting.

As is relevant here, the Texas Tort Claims Act ("Act") waives sovereign immunity for governmental units in the state for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac.& Rem. Code Ann. § 101.021(2). In a long line of cases, the Supreme Court of Texas has reasoned over time that the Act "distinguish[es] claims involving the failure to use, or the non-use of property, which do not waive sovereign immunity, from claims involving a 'condition or use' of tangible personal property that causes injury, which do effect a waiver. *Texas Dep't of Criminal Justice v. Miller,* 51 S.W.3d 583, 587-88 (Tex. 2001) (citations omitted). The Texas Supreme Court has repeatedly held that allegations of liability premised on the non-use of tangible, personal property generally fails to invoke the Act's waiver of governmental immunity. *See id.* The Texas Supreme Court has written:

> This Court has never held that mere non-use of property can support a claim under the Texas Tort Claims Act. We have recognized that for "use" of tangible personal property to occur under the terms of the Act, one must "'put or bring [the property] into action or service; to employ for or apply to a given

purpose.'" The decisions of this Court, however, have not always fallen neatly within this definition when applying the terms of the Act. The difficulty of interpreting the Act's waiver provisions has led this Court on several occasions to request guidance from the Legislature in interpreting these provisions. The Legislature, however, has remained silent on this issue. As a result, our attempts to construe the Act's waiver provisions have resulted in a "long and arduous history" of cases. Two of these cases, in particular, illustrate the difficulty of interpreting these provisions.

In *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976), Lowe alleged that he injured his knee while playing football for the university. The injury allegedly occurred when a coach ordered him to remove his knee brace, worn because of a previous knee injury, and reenter a game without it. *Id.* at 302 (Greenhill, C.J., concurring). This Court concluded that the knee brace was as integral a part of Lowe's uniform as his helmet or shoulder pads. *Id.* at 300. The Court therefore held that the State waived immunity by providing Lowe with a football uniform that was defective due to its lack of a knee brace. *Id.*

This rationale was also applied to invoke the Act's waiver provisions in *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169, 171 (Tex. 1989). In *Robinson*, MHMR took several patients, including Robinson,

> swimming. *Id.* at 169. The employees of MHMR knew that Robinson was epileptic and occasionally suffered seizures, causing him to lose consciousness. *Id.* MHMR and its employees, however, failed to provide Robinson with a life preserver, and he subsequently drowned. *Id.* This Court concluded that "[a] life preserver was just as much a part of Robinson's swimming attire as the knee brace was part of it the uniform in *Lowe*." *Id.* at 171. The Court therefore held that MHMR waived its immunity. *Id.*
>
> These cases represent perhaps the outer bounds of what we have defined as use of tangible personal property. We did not intend, in deciding these cases, to allow both use and non-use of property to result in waiver of immunity under the Act. Such a result would be tantamount to abolishing governmental immunity, contrary to the limited waiver the Legislature clearly intended. The precedential value of these cases is therefore limited to claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and that the lack of this integral component led to the plaintiff's injuries. For example, if a hospital provided a patient with a bed lacking bed rails and the lack of this protective equipment led to the patient's injury, the Act's waiver provisions would be implicated. *Lowe,* 540 S.W.2d at 300.

Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 584-85 (Tex. 1996).

The Texas Supreme Court has repeatedly emphasized the distinction between "use" and "non-use." As the court has recently restated, the *Kerrville* case is an example of how a failure to provide or prescribe medications which allegedly could have prevented the injury constitutes "non-use" and, thus, does not waive sovereign immunity within the meaning of the Act. *Miller,* 51 S.W.3d 587-88. On the other hand, the court observed that *Lowe v. Texas Tech University* is an example of how furnishing a football uniform lacking proper protective device for player's knee injury constitutes "misuse" within the meaning of the Act and, thus, falls within the waiver. *Miller,* 51 S.W.3d at 587-88.

In consideration of the relevant state law, the Court concludes that, as alleged in the second amended pleading, Plaintiffs' claim for the death of Dominga Saenz is subject to dismissal because immunity is not waived under the Act. *See* Fed. R. Civ. P. 12(b)(6). Even accepting all well-pleaded facts as true and viewing them in the light most favorable to Plaintiffs, the government's failure to provide a bullet proof vest to Dominga Saenz constitutes "non-use" under the Act and state case law. Further, Plaintiffs do not allege a misuse of tangible personal property. *See Miller,* 51 S.W.3d at 587-88 (drawing the distinction between "non-use" and "misuse"). Instead, Plaintiffs allege only that Defendants failed to provide tangible, personal property to Dominga Saenz and that the failure to provide, or the absence of, this bullet proof vest resulted in her injury or death.

Under the *Kerrville* and *Miller* cases, the failure to provide a bullet proof vest, which allegedly could have prevented the injury or death, is "non-use" and, thus, does not waive sovereign immunity within the meaning of the Act. *See Miller,* 51 S.W.3d at 587-88 (stating a claim based on non-use of property does not allege "use" within the meaning of the Act); *Kerrville State Hosp.*, 923 S.W.2d at 584 (concluding that a failure to prescribe medications which allegedly could have prevented the injury is a non-use and not within the waiver).

In their response to the motion to dismiss, Plaintiffs refer to a federal district court case in which the district court found sufficient fact issues to preclude summary judgment where the plaintiff argued that a county jail's failure to provide a more secure jail facility constituted "use" under the Act. *Mutrix v. Cameron County,* 809 F. Supp. 510, 513 (S.D. Tex. 1992). Plaintiffs also argue in their response that Defendant's reliance on *Campbell v. City of San Antonio,* 43 F.3d 973 (5th Cir. 1995) is misplaced, but Plaintiffs do not explain why the case is clearly distinguishable. (Dkt. Entry No. 5 at 6.) The court concludes that neither case is dispositive of the "non-use" issue in this instant action, as the Texas cases already cited and discussed contain the relevant legal standards under Texas law. *See Morin,* 309 F.3d at 324 (explaining the federal court's duty to follow state law on substantive issues).

Accordingly, in the clear absence of an allegation of property "use" (or misuse) in the pleading, the

Court concludes that this claim should be dismissed with prejudice under Rule 12(b)(6). *See Blackburn*, 42 F.3d at 931 ("[D]ismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief."); *see also Morin*, 309 F.3d at 328 ("To state a claim under the TTCA based on the use of non-defective tangible personal property, the plaintiff must allege '(1) that the property was used or misused by a governmental employee acting within the scope of his or her employment, and (2) that the use or misuse of the property was a contributing factor to the injury.'") (quoting *Gonzales v. City of El Paso,* 978 S.W.2d 619, 623 (Tex. App. – El Paso 1998, no pet.)).

2. Son

Plaintiffs also allege liability under the Act for the shooting death of Nelson Saenz by the officer(s). (Dkt. Entry No. 23 at 6.) According to Defendant, Plaintiffs fail to state a claim because the fatal shooting of Nelson Saenz constitutes an intentional tort, and intentional torts are expressly excepted under the Act (Dkt. Entry No. 2 at 7-8.)

"The Act specifically excludes waiver for a claim 'arising out of assault, battery, false imprisonment, or any other intentional tort. . . .'" *Texas Dept. of Public Safety v. Petta,* 44 S.W.3d 575, 580 (Tex. 2001) (citing Tex. Civ. Prac.& Rem. Code Ann. § 101.057). A plaintiff may not circumvent governmental immunity by describing what amounts to intentional conduct as an

act of negligence under the Act. *Lopez-Rodriguez v. City of Levelland, Texas,* 100 Fed. App'x 272, 275, 2004 WL 1240524, *2 (5th Cir. 2004) (not designated for publication) (citing *Rucker v. City of Beaumont,* 144 F.Supp. 2d 696, 708 (E.D. Tex. 2001)). At the same time, plaintiffs are not precluded under the Act from properly alleging a claim of negligence when the facts may show that officers in the course and scope of their duty improperly or negligently used tangible personal property and caused an injury or death. *Id.* (citing *Hucker*, 144 F. Supp.2d at 708, and *Texas Dep't of Mental Health and Mental Retardation v. Petty,* 848 S.W.2d 680, 684-85 (Tex. 1992)). To determine whether the plaintiff's claim, comes within the limited waiver or is excepted under the Act, the Texas courts, as a general rule, focus on the conduct giving rise to the harm. *See Petta,* 44 S.W.3d at 580; *see also City of Waco v. Williams,* 209 S.W.3d 216, 221-24 (Tex. App. – Waco 2006, pet. denied) (discussing cases decided by the State's high and intermediate appellate courts on the issue of whether a claim under the Act sounds in negligence or invokes the intentional tort exclusion and reasoning that courts look either at the conduct giving rise to the claim or the tortfeasor's intent to injure); *Harris County v. Cabazos*, 177 S.W.3d 105, 111 (Tex. App. – Houston [1st Dist.] 2005, no pet.) ("Here, the gravamen of appellee's claim is that a Harris County sheriff wrongfully shot appellee. . . . If a plaintiff pleads facts which amount to an intentional tort, no matter if the claim is framed as negligence, the claim generally is for an intentional tort and is barred by the [Act].").

Reviewing the facts as currently pleaded in the complaint under a 12(b)(6) standard of review, the pleading described describes an intentional tort. *See Twombly,* 127 S. Ct. at 1965 ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."). To begin, Plaintiffs do not allege negligence expressly (*e.g.*, a negligent shooting) in the second amended complaint, which notably was filed after the motion to dismiss. *Cf. Lopez-Rodriguez*, 100 Fed. App'x at 275 (finding that summary judgment in favor of defendant was improper because the plaintiffs alleged that the police officer was negligent in aiming and discharging his gun). Rather, in the second amended complaint, Plaintiffs allege that "the [Police Department] shot and killed Nelson Saenz, also a direct violation of Tex. Civ. Prac. & Rem. Code § 101.021." (Dkt. Entry No. 23 at 6, ¶ 6.) The alleged facts state that Nelson Saenz was killed by a bullet fired by the McAllen Police. (Entry No. 23 at 5, ¶ 32.) The facts indicate that multiple shots were fired by the Police. (Dkt. Entry No. 23 at 5, ¶ 31.) The facts also allege that the police knew they were facing a potential deadly-force situation, and they lacked an alternate plan for handling the situation with Nelson Saenz. (Dkt. Entry No. 23 at 5, ¶ 30, 34.) Although Plaintiffs' complaint may suggest or imply negligent actions or conduct by police in handling the overall situation, Plaintiffs nevertheless plead facts that amount to an intentional tort with regard to the actual shooting of Nelson Saenz. *See Petta,* 44 S.W.3d

at 580 (rejecting the plaintiff's claim that sovereign immunity was waived on the premise that a police officer was negligent in ignoring police procedure because the claim arose out of conduct that was clearly intentional namely, the officers hit a car window, aimed his gun, blocked the car in with police cruiser, and fired at the car's tires); *Cabazos*, 177 S.W.3d at 111 ("If a plaintiff pleads facts which amount to an intentional tort, no matter if the claim is framed as negligence, the claim generally is for an intentional tort and is barred by the [Act]."); *see also Huong v. City of Port Arthur*, 961 F.Supp. 1003, 1008-09 (E.D. Tex. 1997) (finding that the intentional tort exclusion applied because defendant officer shot and killed the plaintiff's decedent deliberately and with his service pistol in the face of an imminent threat of bodily harm or death).

Even accepting the Plaintiffs' allegations as true and drawing all reasonable inferences in their favor, the Court concludes that sovereign immunity is not waived under the Texas Tort Claims Act with regard to the claim for Nelson Saenz's death because the claim arises out of conduct that, as alleged, amounts to an intentional tort; therefore, the claim is excluded from the waiver of tort liability. This state law claim is subject to dismissal with prejudice.

VI. Conclusion

Accordingly, it is hereby **ORDERED** that Defendant City's Motion to Dismiss (Dkt. Entry No. 2) is

DENIED as to the municipal liability claim and **GRANTED** as to the state law claims against the City of McAllen. It is therefore **ORDERED** that Plaintiffs' state law claims against the City of McAllen under the Texas Tort Claims Act will be **DISMISSED WITH PREJUDICE**, as set forth in the final order accompanying this memorandum of decision.

The clerk of this Court shall forward a copy of this document to the parties by any receipted means.

Signed at McALLEN, Texas, this 28th day of September, 2007.

/s/ Dorina Ramos
Dorina Ramos
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

IDELMA ANA SAENZ, et al. Plaintiffs	§ § §	
vs.	§	CIVIL ACTION
THE CITY OF MCALLEN, et al.	§ §	NO. M-06-352
Defendants	§ §	

ORDER

(Filed Sep. 28, 2007)

Plaintiffs filed this action pursuant to 42 U.S.C. § 1983 and Texas state law on November 20, 2006. Pending before the Court is the City of McAllen's Motion to Dismiss Plaintiffs' complaint on the grounds that it fails to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Dkt. Entry No. 2.)

Having considered the pleadings, the parties' arguments, and relevant law, it is hereby **ORDERED** that Defendant City's Motion to Dismiss, pursuant to Rule 12(b)(6), is **GRANTED** as to Plaintiffs' claims against the City under the Texas Torts Claims Act, for the reasons set forth in the accompanying Memorandum of Decision and Order. It is further **ORDERED** that Defendant City's Motion to Dismiss, pursuant to Rule 12(b)(6), is **DENIED** as to Plaintiffs' municipal liability claim against the City under 42 U.S.C.

§ 1983, for the reasons set forth in the accompanying Memorandum of Decision and Order. Accordingly, the state law claims are **DISMISSED** with prejudice.

The clerk of this Court shall forward a copy of this document to the parties by any receipted means.

IT IS SO ORDERED.

Signed at McALLEN, Texas, this 28th day of September, 2007.

/s/ Dorina Ramos
Dorina Ramos
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

IDELMA ANA SAENZ, et al. Plaintiffs	§	
vs.	§	CIVIL ACTION NO.
THE CITY OF MCALLEN, et al.	§	M-06-352
Defendants	§	

MEMORANDUM OF DECISION AND ORDER

(Filed Sep. 21, 2009)

Plaintiffs filed this action pursuant to 42 U.S.C. § 1983 and state law on November 20, 2006. The state law claims were dismissed with prejudice on September 28, 2007. (Dkt. Entry Nos. 27-28.) Pending before the Court is Defendants' Motion for Summary Judgment. (Dkt. Entry No. 44.) Plaintiffs filed a response to Defendants' motion, and Defendants filed a reply to the response. (Dkt. Entry Nos. 46-47.) For the reasons set forth below, Defendants' motion is granted.

I. Jurisdiction

This case is before the undersigned by consent of the parties pursuant to 28 U.S.C. § 636(c). The Court has subject matter jurisdiction over the claims

asserted in this action. *See* 42 U.S.C. § 1983 (federal question).

II. Overview of Plaintiffs' Claim & Allegations

Plaintiffs are family members of Nelson Saenz, deceased, and Dominga Saenz, deceased. On September 3, 2005, Linda Lee Hernandez, a cousin, and her husband, Armando Hernandez, who is also an investigator with the McAllen Police Department, went to Nelson Saenz's apartment in response to the family's growing concern about Nelson Saenz's mental well-being. (Dkt. Entry No. 46 at 3.) On their way, the Hernandezes called the McAllen Police Department for assistance – seemingly in the event Nelson Saenz needed to be "sectioned" to the care of the local Mental Health and Mental Retardation Authority. (*Id.*) After the Hernandezes arrived and knocked on Nelson's apartment door to no avail, Armando Hernandez spoke with Dominga Saenz, Nelson's mother, over the phone, and, according to Plaintiffs, he demanded that Dominga Saenz come to Nelson's residence. (*Id.* at 4.) In the meantime, officers with the McAllen Police Department arrived. (*Id.* at 4-6.) Dominga Saenz arrived at the scene with Idelma Ana Saenz and Yolanda Ramirez. (*Id.* at 6.) According to Plaintiffs, before the vehicle Dominga Saenz was riding in came to a complete stop, the Hernandezes opened the car door yanked Dominga Saenz out of the car, told Dominga Saenz they had to hurry to get Nelson Saenz out of his apartment, and walked Dominga

Saenz by the arms up to Nelson Saenz's apartment door. (*Id.* at 6-7.)

Plaintiffs contend that state actors positioned Dominga Saenz in the line of fire in the area around the entrance to Nelson Saenz's apartment, using her as a "human shield" between themselves and Nelson Saenz. (*Id.* at 7.) While Dominga Saenz was in the entrance area, Plaintiffs claim that Ana Saenz told the police Nelson Saenz owned a gun and ammunition and to get her mother out of the area. (*Id.*) According to Plaintiffs, the various state actors knew Nelson Saenz possessed a gun, was armed and dangerous, had a history of homicide and mental illness, had been in an altercation the day before, and was not taking his medications. (*Id.* at 4-5.)

As all of this was happening, Plaintiffs allege that Armando Hernandez was banging on Nelson Saenz's door while Nelson Saenz was cursing and telling them to go away. (*Id.*) Ultimately, gunfire erupted between Defendant Officers and Nelson Saenz. (*Id.*) Both Nelson and Dominga Saenz were shot during the gunfire. Nelson Saenz died at the scene, and Dominga Saenz died later that night at the local hospital. (*Id.*)

Pursuant to 42 U.S.C. § 1983, Plaintiffs allege liability against Defendant Officers in their individual capacities for violating Dominga Saenz's constitutional rights under a state-created danger theory. Plaintiffs seek to hold the City liable pursuant to 42

U.S.C. § 1983 and *Monell v. Dep't. of Social Svcs.*, 436 U.S. 658 (1978), for Dominga Saenz's death.

III. Standard of Review

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56©. The moving party bears the initial burden of informing the court of the basis for its motion and demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). An issue is material if its resolution could affect the outcome of the action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The controverted evidence must be viewed in the light most favorable to the non-movant, and reasonable doubts must be resolved against the moving party. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). If the moving party makes the required showing, then the burden shifts to the non-movant to show that summary judgment is not appropriate. *Matsuhita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-movant does not meet his burden by resting on the mere allegations of his pleading, but, rather, must set forth material controverted facts in his response to the motion for summary judgment. Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 248. This showing requires more than some metaphysical doubt as to the

material facts. *Matsushita Elec. Indus. Co.*, 475 U.S. at 584-86. Summary judgment is proper if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to his case on which he bears the burden of proof. *Celotex*, 477 U.S. at 322-23. "In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* (quotations omitted).

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, ___ U.S. ___, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In *Pearson v. Callahan*, the Supreme Court recently relaxed the rigid order of the qualified-immunity analysis set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), which mandated that a federal court first decide if a constitutional violation occurred before deciding if the law was clearly established. *Pearson*, 129 S. Ct. at 821.

"At the summary judgment stage of a § 1983 action, a defendant asserting immunity is not required to establish the defense beyond peradventure, as he would have to do for other affirmative defenses." *Cousin v. Small*, 325 F.3d 627, 632 (5th Cir. 2003). "The moving party is not required to put forth evidence to meet its summary judgment burden for a

claim of immunity." *Id.* (quoting *Beck v. Tex. State Bd. of Dental Exam'rs*, 204 F.3d 629, 633 (5th Cir. 2000)) (internal quotations omitted). "It is sufficient that the movant in good faith pleads that it is entitled to absolute or qualified immunity." *Id.* (citing *Beck*, 204 F.3d at 633). "Once the [movant] *asserts* this affirmative defense, the burden *shifts* to the plaintiff to rebut it." *Id.* (internal quotations and citations omitted). *Id.* In other words, the plaintiff bears the burden of proving that the qualified immunity defense does not apply. *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc). "To discharge this burden, a plaintiff must satisfy a two-prong test." *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009) (citing *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005)). "First, he must claim that the defendants committed a constitutional violation under current law." *Id.* (internal quotation omitted); *see also Pearson*, 129 S. Ct. at 816 (explaining that, under the first step, "a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c) or shown (see Rules 50, 56) make out a violation of a constitutional right."). "Second, he must claim that the defendants' actions were objectively unreasonable in light of the law that was clearly established at the time of the actions complained of." *Club Retro, L.L.C.*, 568 F.3d at 194 (quoting *Atteberry*, 430 F.3d at 253). "To be 'clearly established' for purposes of qualified immunity, '[the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (citing

Kinney v. Weaver, 367 F.3d 337, 349-50 (5th Cir. 2004) (en banc), and quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)).

IV. Applicable Law & Conclusions

A. Defendant Officers & State-Created Danger

In *DeShaney v. Winnebago County Dep't of Soc. Servs.,* 489 U.S. 189, 196-97 (1989), the Supreme Court of the United States stated that "[a]s a general matter . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." At the same time, the Court recognized two potential exceptions. The first concerns special or custodial relationships.[1] *Deshaney,* 489 U.S. at 200. The Supreme Court has stated the general rule as follows: "When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and well-being." *Id.* The second exception concerns the creation of a duty to protect individuals from harm when the state actor's actions creates or exacerbates a danger to an individual. *DeShaney,* 489 U.S. at 201; *Johnson v. Dallas Indep. School Dist.* 38 F.3d 198, 200 (5th Cir. 1994) ("When state actors

---

[1] Plaintiffs do not argue that a special relationship existed. Instead, Plaintiffs proceed strictly on a state-created danger theory. (*See* Dkt. Entry No. 46.)

knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state 'custody.'"). This second *DeShaney* exception is often referred to as the "state-created danger" theory. *See Morin v. Moore,* 309 F.3d 316, 321-24 (5th Cir. 2002) (discussing this theory of section 1983 liability).

The viability of a constitutional violation premised on the state-created danger doctrine has been acknowledged but never clearly or expressly adopted by the Fifth Circuit. *See, e.g., Rios v. City of Del Rio,* 444 F.3d 417, 422 (5th Cir. 2006) ("[T]his court has frequently spoken of the 'state-created danger' theory, and has discussed its various permutations and requirements as applied in other circuits, but neither the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof.") (citing *McClendon,* 305 F.3d at 330-32). In a recent unpublished decision, a Fifth Circuit panel reiterated that "[t]his Circuit has never expressly accepted the state-created danger theory that a due process violation can be found if a state created or increased the danger to the plaintiffs and acted with deliberate indifference." *Hale v. Bexar County, Texas,* No. 08-50820, 2009 WL 2222833, *4 (5th Cir. July 27, 2009).

Notwithstanding the viability issue, the Fifth Circuit, at a minimum, has set forth the elements of such a claim. The plaintiff must show that the harm

to the plaintiff resulted because (1) the state actors created or increased the danger to the plaintiff; and (2) the state actor acted with deliberate indifference toward the plaintiff. *Morin*, 309 F.3d at 323 (citations omitted). The theory also requires a showing of an identifiable or foreseeable victim. *See Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389, 391-92 (5th Cir. 1999) (stating that the state-created danger theory is "inapposite without a known victim"). Deliberate indifference means that a state actor "must know of and disregard an excessive risk to the victim's health or safety." *McClendon*, 305 F.3d at 326 n.8 (citations and quotations omitted). "[T]o establish deliberate indifference, the plaintiff must show the 'environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.'" *Piotrowski v. City of Houston*, 237 F.3d 567, 585 (5th Cir. 2001) (citing *Johnson*, 38 F.3d at 201). "The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid." *Id.* "The state actor's actual knowledge is critical to the inquiry." *McClendon*, 305 F.3d at 326 n.8. "A state actor's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, does not rise to the level of deliberate indifference." *Id.* (citations and quotations omitted).

Defendants contend that the state-created danger exception is not a viable theory of liability in this circuit. (Dkt. Entry No. 44 at 9-10.) Defendants argue alternatively that, even if the state-created danger theory is cognizable, the Defendant Officers are entitled to qualified immunity at the summary-judgment stage because Plaintiffs' claim fails under the basic elements of this theory. (*See id.* at 10-23.) Defendants argue that they did not create or increase any danger to Dominga Saenz, and there is no evidence that Defendants had actual knowledge of and disregarded an excessive risk to Dominga Saenz. (*See id.* at 10-23.)

The events of the day at issue are quite tragic and unfortunate. However, the Court concludes that summary judgment in favor of Defendants is proper as a matter of law because the Fifth Circuit has not formally recognized and adopted this theory of recovery in a civil rights action. Alternatively, even assuming, but not deciding, that this a viable theory in the Fifth Circuit, the Court concludes that Defendants have met their burden on summary judgment, and Plaintiffs have not. The Court finds that there is an absence of a constitutional violation, so Defendant Officers are entitled to qualified immunity. The Court concludes that Plaintiffs have not adduced evidence that state actors created or increased the danger to Dominga Saenz or acted with the requisite deliberate indifference, nor have Plaintiffs raised any genuine issue of material fact in this regard.

Plaintiffs argue that Defendants created a deadly situation, knew the situation was deadly, and used their authority to place Dominga Saenz in a situation in which she was caught in the crossfire. (Dkt. Entry No. 46 at 2.) To avoid summary judgment, Plaintiffs point to evidence to show that Armando Hernandez, acting in the capacity of a state actors, not as a family member,[2] ordered Dominga Saenz to go to Nelson Saenz's home during a phone conversation, that Dominga Saenz followed his order, that Armando Hernandez and his wife escorted Dominga Saenz out of the vehicle once she arrived at the scene and led her by the arms to Nelson Saenz's front door area, that police stationed themselves around Dominga Saenz while she was standing at Nelson Saenz's apartment door, and that state actors aggravated Nelson Saenz by persistently knocking on his door. (*Id.* at 5-8; 12-14.) Plaintiffs point to evidence that the police officers/state actors at the scene, including Armando Hernandez, were informed about or already knew recent and historical information about Nelson Saenz's dangerousness and volatility and the fact that Nelson Saenz owned guns and ammunition. (*Id.* at 5-8) Plaintiffs direct the Court's attention to evidence that armed police officers stood behind

---

[2] The Court will also assume for the purposes of this motion that Defendant Armando Hernandez, who is married to Linda Lee Hernandez, a cousin, and is an investigator for the McAllen Police Department, is a state actor, even though the parties dispute his status given that he is a family member and was off-duty at the time of the fatal events. (*See* Dkt. Entry No. 47 at 3.)

Dominga Saenz while she was standing in front of Nelson Saenz's door. (*Id.* at 7.)

The Court finds that Plaintiffs have not adduced evidence which shows that state actors used their authority to place Dominga Saenz in a dangerous situation or place her in a situation she would not otherwise have faced.[3] Plaintiffs claim that Defendants used their authority to call Dominga Saenz and order her to come to the scene. (*See* Dkt. Entry Nos. 29; 46.) However, drawing all reasonable inferences in a light most favorable to Plaintiffs, the summary judgment evidence shows that Dominga Saenz and her daughters elected to go to Nelson Saenz's residence voluntarily. By Plaintiffs' own account, Yolanda Ramirez, Dominga Saenz, and Ana Saenz decided to drive to the McAllen Police station to assist with sectioning Nelson Saenz. (Dkt. Entry No. 46 at 5.) According to Ana Saenz's affidavit, once they were in the car, Ana Saenz told her sister, Yolanda Ramirez, to drive by Nelson's apartment. (Dkt. Entry No. 46 at 5.) According to Yolanda Ramirez's deposition testimony, while she, Dominga Saenz, and Ana Saenz were driving to the McAllen Police Department, her mother instructed her to drive by Nelson Saenz's apartment since it was on the way to the police station. (Dkt. Entry No. 44, Ex. J, at 69-70.) Although Plaintiffs point to evidence that Armando Hernandez

---

[3] The Court's conclusion and reasoning apply to the issue of whether Defendants created or increased the danger, as well as to the issue of deliberate indifference.

insisted that Dominga Saenz be at the scene, the Hernandezes escorted Dominga Saenz by her arms to Nelson Saenz's front door, and Armando Hernandez told Dominga Saenz they could help Nelson Saenz before the police got to him, the Court finds that it is unreasonable and too attenuated to infer from Plaintiffs' evidence that state actors deprived Dominga Saenz of her ability to act on her own behalf or that her presence or actions at the scene are attributable to the state actors within the meaning of the exception from *DeShaney*. With that conclusion, the Court finds that it is not enough to show that state actors influenced Dominga Saenz's decision to go to Nelson Saenz's residence or approach his front door. *Cf. Rivera v. Rhode Island,* 402 F.3d 27, 38 (1st Cir. 2005) (concluding that a state's promise of witness protection, whether false or merely unkept, did not deprive the victim of the liberty to act on her own behalf, nor did the state force the victim, against her will, to become dependent on it and stating that "[m]erely alleging state actions which render the individual more vulnerable to harm, under a theory of state created danger, cannot be used as an end run around *DeShaney's* core holding").

Although Plaintiffs argue that state actors created a deadly situation, the Court finds that this is not a case where state actors exposed Dominga Saenz to a danger of their own creation. The evidence at this stage does not suggest or demonstrate that state actors had anything to do with Nelson Saenz arming himself or using deadly force when he opened the

door of his apartment, nor did they have any control over Nelson's mental condition. The only evidence Plaintiffs point to in this regard is the persistent knocking that, Plaintiffs argue, agitated Nelson Saenz. Even with the knocking, the alleged facts and summary judgment record do not present or demonstrate a situation where the state created the danger itself. *Cf. Morin,* 309 F.3d at 323-24 (noting that the case was similar to *Piotrowski,* 237 F.3d at 584, where the court concluded that the defendant City did not create the danger the plaintiff faced); *Piotrowski,* 237 F.3d at 584 (concluding that the City did not create the danger and noting that the City, at most, left the victim in an already dangerous position).

Plaintiffs also fail to show that qualified immunity is not applicable with regard to the element of deliberate indifference. Plaintiffs come forward with evidence that various officers possessed Nelson Saenz's background information (*e.g.,* that he had killed his wife years before and was mentally unstable), knew Nelson Saenz owned guns and brandished a gun a day prior to the tragic shootings, and knew the situation was risky because the officers were taking precautions, such as donning bullet-proof vests and clearing a communication channel, on their own. However, this is insufficient for the purposes of actual knowledge and deliberate indifference. Plaintiffs have not adduced evidence that Defendants knew with any degree of specificity or certainty that Nelson Saenz was actually armed or what Nelson Saenz might do based on what was known to them. Plaintiffs have

not come forward with evidence showing that Defendants knew Nelson Saenz posed an actual threat or a specific risk of harm to anyone in particular. *Cf. Morin,* 309 F.3d at 322 (reiterating that the state-created danger theory generally requires actual knowledge of a specific risk of harm to a known victim). Furthermore, Plaintiffs' evidence that state actors escorted Ms Saenz to the door and stood behind her while she pleaded with her son is not sufficient to demonstrate that the state actors effectively stripped Dominga Saenz of her ability to defend herself or cut off potential sources of private aid, nor does it raise a genuine issue of material fact in that regard. *Piotrowski,* 237 F3d at 585 ("The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid."). Indeed, there is no dispute that the police were positioned in close proximity to Dominga Saenz as she stood by Nelson Saenz's apartment door. (*See* Dkt. Entry No. 46 at 7.) There is also no dispute that multiple family members were present in the vicinity and that Dominga Saenz was just as knowledgeable about Nelson Saenz's history and current emotional state as the police. (*See id.* at 3.) There is no evidence that state actors prevented Dominga Saenz from receiving aid. (*See id.* at 8.)

The thrust of Plaintiffs' claim and evidence is that, based on historical information about Nelson

Saenz, their observations, and assessment of the scene, Defendants should have recognized the potential magnitude of the danger of the situation and, accordingly, should not have allowed or encouraged Domingo Saenz to be present or failed to remove Dominga Saenz from the situation. (*See* Dkt. Entry No. 46 at 14.) Although Plaintiffs' evidence is unquestionably relevant, the Court finds that Plaintiffs' offerings are insufficient to avoid summary judgment under the Fifth Circuit's stringent test for deliberate indifference. The Fifth Circuit has emphasized that a state actor's failure to alleviate a "significant risk that he should have perceived but did not, while no cause for commendation, does not rise to the level of deliberate indifference." *McClendon,* 305 F.3d at 326-27 (quotations and citations omitted). The Fifth Circuit has stated "it is not enough to show that the state increased the danger of harm from third persons; the § 1983 plaintiff must also show that the state acted with the requisite culpability in failing to protect the plaintiff from that danger to make out a constitutional violation." *Leffall v. Dallas Indep. School Dist.,* 28 F.3d 521, 531 (5th Cir. 1994). The Fifth Circuit has elaborated in various contexts that deliberate indifference "is a degree of culpability beyond mere negligence or even gross negligence; it 'must amount to an intentional choice, not merely an unintentionally negligent oversight.'" *James v. Harris County,* ___ F.3d ___, 2009 WL 2366557, *4 (5th Cir. Aug. 4, 2009) (quoting *Rhyne v. Henderson County,* 973 F.2d 386, 392 (5th Cir. 1992)). Moreover, there is no dispute that the officers were standing behind

Dominga Saenz at the time of the shooting and responded with deadly force to Nelson Saenz after he started shooting (*see* Dkt. Entry No. 46 at 7-8), so the state actors did not fail to take any action to alleviate the danger Plaintiffs allege the state actors created or aggravated, which undermines Plaintiffs' claim of deliberate indifference. *See Salas,* 980 F.2d at 309 (concluding that the defendant sheriff was not liable under the state-created danger theory because he neither created the immediate risk of danger to the hostage nor did he abandon the victim in the face of the danger presented); *Leffall,* 28 F.3d at 531-32 (observing that "good faith but ineffective responses" by state actors tend to defeat claims of deliberate indifference) (citation omitted). The case law in this circuit further supports the conclusion that Plaintiffs have failed to adduce sufficient evidence that the state actors had the requisite knowledge and disregard of an excessive risk to Ms. Saenz's health or safety. *Cf. Rios,* 444 F.3d at 423 (observing that, at the motion-to-dismiss stage, there was no allegation that the defendant officer's action or inaction had the purpose or intention of causing injury to anyone in particular when the officer left a suspect unattended in the officer's patrol car with the keys in the ignition); *McClendon,* 305 F.3d at 326 (holding that a police officer who lent a gun to an informant was not deliberately indifferent toward a third-party who was shot by the informant with the officer's gun); *Beltran v. City of El Paso,* 367 F.3d 299, 307-08 (5th Cir. 2004) (concluding that the emergency operator's errors in failing to better investigate or safeguard the victim

constituted negligence, not deliberate indifference); *Morin,* 309 F.3d at 323-24 (finding an absence of deliberate indifference by the officer, whose son took his father's (improperly obtained) AK-47 and killed three people); *Piotrowski,* 237 F.3d at 585 (concluding that the defendants' protection of or involvement with the assailant did not amount a constitutional violation); *Saenz,* 183 F.3d at 392 (concluding that the defendant officer did not violate substantive due process rights of motorists who were killed by a drunk driver, even though the defendant officer ordered another officer to refrain from investigating the drunk driver on suspicion of driving while intoxicated minutes before accident occurred, because the defendant officer was neither aware of an immediate danger facing a known victim, nor did he use his authority to prevent the victims from receiving aid). The Court's conclusion regarding the issue of deliberate indifference is further underscored by the absence of evidence that Defendants created the danger themselves or increased the danger to the extent Dominga Saenz voluntarily placed herself into the environment. *Cf. Piotrowski,* 237 F.3d at 585 n.33 (distinguishing the facts of the case from other cases "in which the [state actors] created the dangerous situation and precluded the plaintiff from protecting herself"); *Salas,* 980 F.2d at 309 (discussing cases where officials failed to take any action to alleviate the danger which they created or aggravated).

In summary, the requisite culpable knowledge and conduct for a constitutional violation are lacking

in this case, and, as such, Defendant Officers are entitled to qualified immunity.

2. Municipal Liability

Municipalities and cities qualify as persons liable to suit under § 1983. *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532-33 (5th Cir. 1996). However, municipalities may only be held liable if the constitutional harm suffered was the result of an "official policy, custom, or pattern." *Monell*, 436 U.S. at 692-94. "Under the decisions of the Supreme Court and this court, municipal liability under section 1983 requires proof of three elements: a policymaker; an official policy or custom; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski*, 237 F.3d at 578 (citing *Monell*, 436 U.S. at 694). To support a claim based upon the existence of an official custom or policy, the plaintiff must plead facts which show that: 1) a policy or custom existed; 2) the governmental policy makers actually or constructively knew of its existence; 3) a constitutional violation occurred; and 4) the custom or policy served as the moving force behind the violation. *Meadowbriar*, 81 F.3d at 532-33 (citing *Palmer v. City of San Antonio*, 810 F.2d 514, 516 (5th Cir. 1987)).

Municipal liability may not be predicated on *respondeat superior* because the text of section 1983 will not bear such a reading. *Piotrowski*, 237 F.3d at 578 (citing *Bd. of Comm's of Bryan County v. Brown*,

520 U.S. 397, 403 (1997)). "[T]he unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur; isolated unconstitutional actions by municipal employees will almost never trigger liability." *Id.* (citing *Bennett v. City of Slidell,* 728 F.2d 762, 768 n.3 (5th Cir. 1984), and *McKee v. City of Rockwall,* 877 F.2d 409, 415 (5th Cir. 1989)).

Official policy is:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body delegated policy-making authority.

Webster v. City of Houston, 735 F.2d 838, 841(5th Cir. 1984). Official policy does not necessarily require formal approval through the body's official decision making channels. *Monell,* 436 U.S. at 690-91. Where a plaintiff bases municipal liability on the latter definition of official policy, the plaintiff must show that "the relevant practice is so widespread as to have the force of law." *Brown,* 520 U.S. at 404. Evidence of

an isolated incident is generally insufficient to establish a custom. *Pineda v. City of Houston,* 291 F.3d 325, 329 (5th Cir. 2002).

"Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Brown,* 520 U.S. at 405. Accordingly, in addition to establishing the existence of an illegal custom, a plaintiff must also demonstrate that the municipal policymakers are actually or constructively aware of the custom. *Pineda*, 291 F.3d at 330-31. Additionally, a plaintiff must establish that the municipality promulgated the custom with "deliberate indifference to the 'known or obvious consequences' that constitutional violations would result." *Piotrowski,* 237 F.3d at 579 (quoting *Brown,* 520 U.S. at 407).

The undersigned concludes that Defendant City is entitled to summary judgment. To the extent Plaintiffs claim that the City has a "shoot first, ask questions later" policy, Plaintiffs rely only on the allegations in their pleadings. Plaintiffs cannot withstand summary judgment based solely on generic, unsubstantiated, or conclusory allegations in the pleadings that the City has a "shoot first, ask questions later" policy, nor can the Court assume that Plaintiffs can or will prove up their case at a later point. *See* Fed. R. Civ. P. 56(e); *Anderson,* 477 U.S. at 248 (stating that the non-movant does not meet his

burden by resting on the mere allegations of his pleading, but, rather, must set forth material controverted facts in his response to the motion for summary judgment); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (explaining that the nonmovant's burden is not satisfied with "conclusory allegations," "unsubstantiated assertions," or "by only a 'scintilla' of evidence and explaining that, in absence of any proof, the court will not assume that the nonmoving party could or would prove the necessary facts). Further, to the extent Plaintiffs seek to avoid summary judgment by relying on their expert's opinion that the chief policymaker ratified the officers' conduct – a newly, but vaguely, asserted theory in Plaintiffs' responsive pleading which appears to turn on the existence of a substantive due process violation based on a state-created danger (*see* Dkt. Entry No. 46 at 14), this opinion evidence is of no effect in light of the Court's conclusion that there was no constitutional violation. *See Rios*, 444 F.3d at 426; *see also Piotrowski*, 237 F.3d at 578-81 (explaining the elements of municipal liability and referencing the single-incident exception). Moreover, Plaintiffs have failed to adduce any evidence or raise a genuine issue of material fact on the element of causation. *See Piotrowski*, 237 F.3d at 580 (explaining that there must be a direct causal link between the municipal policy and the constitutional deprivation, which *Monell* describes as the "moving force"); *see also Fraire v. City of Arlington*, 957 F.2d 1268, 1281 (5th Cir. 1992) ("[A] direct causal connection must exist

between the policy and the alleged constitutional deprivation.").

Plaintiffs have failed to show that summary judgment is not appropriate. Accordingly, the Court concludes that Defendant City is entitled to summary judgment because it has shown that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.

V. Conclusion

It is hereby **ORDERED** that Defendants' Motion for Summary Judgment (Dkt. Entry No. 44) is **GRANTED** in full, and all of Plaintiffs' remaining claims against Defendants shall be **DISMISSED WITH PREJUDICE**, as set forth in the final order accompanying this Memorandum of Decision.

The clerk of this Court shall forward a copy of this document to the parties by any receipted means. **IT IS SO ORDERED**.

Signed at McALLEN, Texas, this 21st day of September, 2009.

/s/ Dorina Ramos
Dorina Ramos
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

IDELMA ANA SAENZ, et al. Plaintiffs	§	
vs.	§	CIVIL ACTION
THE CITY OF MCALLEN, et al.	§	NO. M-06-352
Defendants	§	

JUDGMENT

(Filed Sep. 21, 2009)

For the reasons set forth in the Memorandum of Decision and Order, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment (Dkt. Entry No. 44) is **GRANTED**. It is therefore **ORDERED** that Plaintiffs' remaining claims against Defendants are **DISMISSED WITH PREJUDICE**.

This is a **FINAL JUDGMENT**. The clerk shall forward a copy of this final judgment to the parties by any receipted means.

DONE at McALLEN, Texas, this 21st day of September, 2009.

/s/ Dorina Ramos
Dorina Ramos
UNITED STATES
MAGISTRATE JUDGE